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YATES ET AL. VS. JONES NATIONAL BANK ET AL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
FEB 4 1907
JAMES H. McKENNEY
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CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
vs.
UTICA BANK, *Defendant in Error*. } No. 231

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vs.
THOMAS BAILEY, *Defendant in Error*. } No. 232

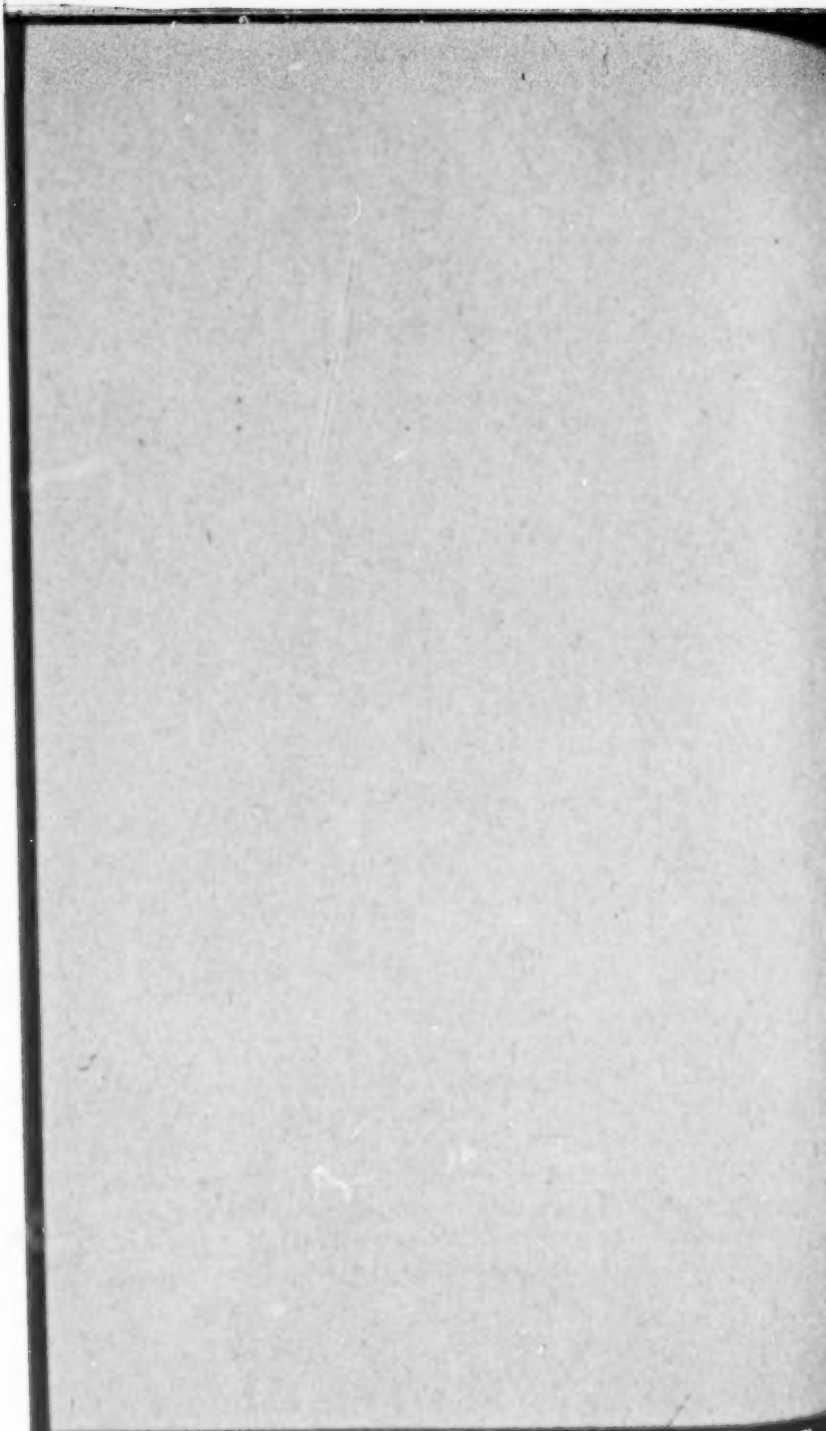
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vs.
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BRIEF FOR PLAINTIFFS IN ERROR.

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BRIEF FOR PLAINTIFFS IN ERROR.

These cases grew out of the failure of the Capital National Bank of Lincoln, Nebraska, in January, 1893. C. W. Mosher was president of the bank and R. C. Outcalt was cashier. The Comptroller of the Currency appointed a receiver who took charge of the bank to collect and distribute the assets under the National Banking Act. The plaintiffs in error, Charles E. Yates, David E. Thompson

and E. P. Hamer, together with others, were directors of said bank. Subsequently Hamer died and his estate is represented in these cases by Louisa Hamer, as administratrix. Each defendant in error was a depositor in, and lost money by reason of the failure of, the bank. All of the four cases are alike except as to names and amounts claimed, and were all tried together at one time before the same court and the same jury, and were all heard in the Supreme Court of the State at one time and governed by one decision. Each case involves the same identical questions, except that in the Bailey case a question of former adjudication is involved. Each of the plaintiffs in error is sued in his individual capacity as a director of the Capital National Bank. They contend that their liability, if any, is controlled and must be determined by a consideration of their duties as directors acting under the law governing a national bank. That these actions are for misfeasance and mismanagement of the affairs of the bank; and, further, that the individual liability of the directors is governed by section 5239 of the National Banking Act, where, in acts done, or duties neglected, they

"knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title; * * * and in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person shall have sustained in consequence of such violation."

The defendants in error claim that these are common law actions of deceit, and that the liability of the plaintiffs in error is not governed by the National Banking Act.

The important question to determine therefore is the character of these suits and the law applicable to and governing the charges made against the plaintiffs in error.

It may aid the court to have a brief history of this litigation by reference to the different petitions filed, the several decisions of the courts, both State and Federal, and the manner of the trial resulting in the final decision now complained of.

No defense is here made for Charles W. Mosher and R. C. Outcalt, the President and Cashier of the bank. We appear only for the three directors, Yates, Thompson and Hamer.

Soon after the failure of the bank each one of the defendants in error brought an action against the president and cashier, and each of the directors of the bank in the District Court in Lancaster County, Nebraska, to recover the amount he had on deposit at the time of the failure.

The defendants demurred to the petitions for the reason that the damages, if any, were an asset of the bank, which could not be recovered by the plaintiffs, and that the petitions did not state facts sufficient to constitute a cause of action against the defendants.

The cases were all removed to the Federal Court.

On motions to remand, the Circuit Court overruled the motion in the Bailey case, sustained the demurrer, and dismissed that case with judgment for costs, leaving the other cases undisposed of on the docket until a final decision could be had in the Bailey case in the Court of Appeals. The decision of that court will be found in 63 Fed. Rep. page 488, where the ruling of the lower court on the motion to remand and on the demurrer filed by the defendant, was affirmed. Said judgment is still in full force and effect. Bill Ex. page 256.

After the decision of the Court of Appeals in the

Bailey case, the plaintiffs in the other three cases dismissed their several suits without prejudice and brought the present suits in Seward County, Nebraska, including a new suit by Bailey against the same defendants named in the first suit, notwithstanding the final judgment and dismissal of his case in the Federal Court.

The four different petitions in the Lancaster cases were alike, except the names of the plaintiffs and the amounts claimed; and the same fact is true of the four different petitions subsequently filed in Seward County. The Lancaster petitions and the Seward petitions are, in legal effect, the same, but the wording is changed in the Seward petitions, plainly indicating an effort on the part of the pleader, to avoid the federal question, and the consideration of the National Banking Act in determining the liability of the directors.

We call attention to the wording of the petitions in the first actions brought as compared with the wording in the second actions brought to show that the two different actions are the same, in effect, althought in the last actions an effort was made on the part of the plaintiffs to so word their petitions as to avoid the federal question.

The petition filed in the first case by Bailey in Lancaster County, which is the same as the other three petitions, will be found on page 258 of the bill of exceptions. It will be seen that the plaintiff charged that the defendants were officers and directors of the "Capital National Bank, which was duly organized and incorporated under and by virtue of the banking laws of the United States." That the defendants named "were the directors and officers of said bank and as such directors and officers had entire and exclusive control and manage-

ment of the business and affairs of said bank;" that the plaintiff deposited money in the bank, and that subsequently the bank failed on January 23, 1893, and the plaintiff was damaged by the loss of his money deposited. That the Comptroller of the Currency had appointed a receiver who had possession and control of the assets of said bank. That on December 9, 1892, "in compliance with the laws of the United States and upon the order and direction of the Comptroller of the Currency of the United States," the president and cashier, Mosher and Outcalt, made a statement of the condition of said bank and that Yates and Phillips attested the same while "acting as directors of said bank," and caused the same to be published in the daily newspapers of general circulation. That the defendants made other statements regularly, as required by law, to the Comptroller of the Currency, and caused the same to be published in the newspapers. That a similar report was made by Mosher and Outcalt and attested by D. E. Thompson as director on December 28, 1886, and both reports were attached to the petition as exhibits "A" and "B." It is alleged that the statements thus made were false and untrue, and the assets and liabilities of the bank incorrectly stated for the purpose of misleading and deceiving the plaintiff and others, and to induce the plaintiff and others to loan and deposit money in said bank; that each of the defendants had knowledge of the falsity and incorrect statements in the reports, and that they were grossly negligent and careless in their duty in the management of the affairs of said corporation. That they ought to have known of such deceit and falsity; that loans of money were made for large amounts to Charles W. Mosher, the President of the bank, and to his brother, E. W. Mosher, and to R. C. Outcalt, the Cashier of said bank, in excess of the amount allowed by law to be loaned to any one person; and that the defendants

regularly declared and paid dividends when there were no net profits out of which such dividends could be paid, and that "by reason of the several violations of the banking law, as above set forth, the several defendants have become and are liable to this plaintiff for the damages he has sustained."

The Court of Appeals in construing the petitions filed in Lancaster County, (63 Fed. Rep. 489) said:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors."

That court affirmed the judgment of the lower court sustaining the demurrer to the petition.

After the disposal of the cases commenced in Lancaster County, the present actions were commenced by the same plaintiffs in Seward County. These petitions will be found on pages 6 and 7 in the printed transcripts filed in this Court.

In these new petitions it is alleged that "at the several times mentioned, the defendants acted as the directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business in the city of Lincoln, Nebraska, and as such directors had the full control and management of said bank. That, acting as such directors and officers of said bank it became and was the duty of the defendants and each of them under the law as well as by the by-laws of said bank to actively and actually manage and superintend the business of the same." To diligently look after the loans and discounts, examine the books and all the assets of the

bank, and to include in its statements only valuable assets and not to include such as were worthless or of little value.

That the defendants failed to perform their duties as imposed upon them "by law and by the by-laws of said bank" and by reason of such failure large loans were made by the bank to insolvent persons and to its officers, relatives and favorites; that the defendants permitted and allowed and caused to be published to the public, and to the plaintiff false statements which they knew, and were in duty bound to know, were false and untrue. Such statements being made while "the bank was in fact in an insolvent condition and was and had been in an insolvent condition since and prior to December 9, 1892, and *that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the bank and its business.*" That "the defendants had knowledge of such insolvency, or ought to have known and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors."

That "on the 28th day of December, 1886, the defendants acting as such directors and officers of said bank," and "on December 9, 1892, for the purpose of inducing the plaintiff and others to do and continue business with the bank, caused, allowed and permitted false statements of the condition of the said bank, its resources and liabilities, which statements are attached to the petition, marked exhibits A and B. Said statements were made, caused, allowed and permitted to be made and published by the said defendants as such directors and officers of said bank, and permitted said false statements to be published in the newspapers."

The petitions concluded as follows: "Plaintiff states

that by reason of the facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants, the plaintiff has been damaged in the sum of $15,000."

The cases thus filed in Seward County were removed to the federal court, and a motion to remand was sustained. See Bailey vs. Mosher et al., 74 Fed. 15. When remanded to the State Court the several petitions were amended in 1897. The cases were then continued from term to term until March 16, 1899, when the plaintiffs again amended their petitions by interlineation, at which time the cases were again removed to the federal court, and the court refused to remand, holding that the petitions, as amended, raised a federal question. See Bailey vs. Mosher et al., 95 Fed. 223.

The plaintiffs then carried one case to the Court of Appeals, and the judgment of the lower court was reversed and remanded, the Court of Appeals holding that if there was a federal question raised by the petitions as finally amended by interlineation, the same federal question appeared in the amended petition filed in 1897, and therefore the removal was too late. See Jones vs. Mosher et al., 107 Fed. 561.

It will be noticed that the State Court in its decision stated that the case was remanded to the State Court by the decision in 107 Fed. "for the reason that it involved no federal question." This is clearly a mistake. The Court of Appeals expressly disclaimed any attempt to decide that question, and simply held that the application for removal should have been filed at once after the amendment was made; no such application having been made within the time prescribed by law, the right of removal was waived.

In both sets of petitions the same cause of action is alleged, the same neglect of duty under the law by the directors of a National Bank while acting in their official capacity as such directors; the same violation of the duty imposed upon them by the law and by-laws of the Capital National Bank.

In the first set of petitions it was alleged that the "Capital National Bank was duly organized and incorporated under and by virtue of the banking laws of the United States."

In the second set of petitions, at Seward, it is alleged that, "at the several times hereinafter mentioned the defendants acted as directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business."

In the first set it is alleged that the "defendants were the directors and officers of said bank, and as such directors and officers had entire and exclusive control and management of the business and affairs of said bank."

In the Seward petitions it is alleged that it was the "duty of the defendants and each of them under the law as well as the by-laws of the said bank, to actively and actually manage and superintend the business of the same."

In the first set it was alleged that "in compliance with the laws of the United States and upon an order and direction from the Comptroller of the Currency of the United States, the said defendants" made certain reports of the condition of the bank.

In the second it was alleged that the defendants "made, caused, allowed and permitted to be made statements by

said defendants as such directors and officers of said bank, the said defendants and each of them acting as such directors and officers of said bank."

The bank, being a national bank, could not be "duly organized" under any law except under the National Banking law. No bank in the United States is permitted to use the word "National" in its title except it be organized under the National Banking Act. Sec. 5243, of said Act. United States vs. Northway, 120 U. S. 336.

It was further alleged in the Seward petitions "that acting as such directors and officers of said bank it became and was the duty of the defendants and each of them *under the law as well as the by-laws of said bank* to actively and actually manage and superintend the business of the same."

In the case of Walker vs. Windsor Nat'l Bank, 56 Fed. 80, it was held that the performance of duties imposed by law and the by-laws of a National bank necessarily meant the duties imposed by the National Bank Act.

In the first set of petitions it is alleged that the plaintiffs were damaged "by reason of the several violations of the banking law as above set forth."

In the Seward petitions it is alleged that the plaintiffs were damaged "by reason of the facts as above set forth and the false and fraudulent statements."

The facts set forth and the statements referred to are the same in both sets of petitions, except certain legal conclusions.

The decision of the State Court now under consideration lays stress upon the fact that certain legal conclusions

set forth in the first petitions being omitted from the second petitions, has great weight in determining the character of the actions now under consideration; and saying further, "we know of no rule of pleading that would justify this court in assuming that the plaintiff *intended* to plead a cause of action which he could not maintain." Transcript 61.

Is it possible that a court will be governed, in construing a pleading, by what it assumes was the *intention* of the pleader, rather than give effect to the pleading itself?

The State Court in speaking of the decision of the federal court on the Lancaster petitions further said:

"It does not dispose of the action for deceit on its merits, but on the technical ground that by the averment of *mere conclusions of law* the plaintiff had committed himself to the theory that the action was of a different character and precluded an examination of the merits of his action for deceit."

If it be true that mere conclusions pleaded amount to nothing, then the first and second petitions are the same in legal effect.

In the case of Goldwashing Co. vs. Keys, 96 U. S. 202, it is held:

"The office of a pleading is to state facts and not conclusions of law. It is the duty of the court to declare the conclusions, and of the papers to state the premises."

And again on page 203, the court says:

"The immunities of the statutes are in effect conclusions of law from the existence of the particular facts. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough, for that is the precise question the court is called upon to determine."

The State Court concludes that the two sets of petitions are substantially the same. P. 57.

"The petitions in the latter cases as they stood at the time of the trial are substantially the same as those in the former save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned purporting to show the financial condition of said bank were made in pursuance of the banking laws of the United States, or on the demand of, or to the Comptroller of the Currency."

But the statements complained of and introduced by the plaintiffs below were (as shown on their face) in fact the reports of the Capital National Bank made to the Comptroller of the Currency. Page 275 of the bill of exceptions. The reports on which plaintiff relied and introduced in evidence were brought by one of the officials in the office of the Comptroller, from Washington, for use in the trial. Bill exceptions, page 1 and following.

The statements that were published in the newspapers were copies of these reports to the Comptroller. See the evidence of H. J. Whitmore, the expert bank examiner, called by the plaintiff. Page 134 of the bill of exceptions.

The two sets of petitions differ alone in the wording of the same cause of action, and if the legal conclusions set forth in one, and omitted in the other, justified the State Court in assuming that there was a different cause of action, such difference was eliminated by the facts proved in the trial.

The State Court accordingly held:

"1. Damages, resulting to a National bank, from the misfeasance or mismanagement of its officers, are assets of the bank, and are recoverable only in an action brought

by the bank, or for the benefit of all the stockholders and directors thereof."

This holding agrees with the decision of the Federal Court in the first actions brought above referred to.

ISSUES JOINED—ANSWERS.

The decision of the State Court under consideration, seems to be based entirely on the construction of the *petitions* filed, as though the federal rights related alone to the question of removal. But it will be seen that answers were filed by each of the defendants, alleging that the Capital National Bank was duly organized under and in accordance with the National Banking Act; and that each of said defendants, in all of the acts complained of, acted, (as also alleged in the petition,) in his official capacity as a director of a National bank, and claimed the protection of the National Banking Act as governing the defendants and their liability under the facts alleged against them. Printed transcript in Bailey case, page 16.

The State Court erred in deciding the character of the suits, by looking alone to the legal conclusions in one set of petitions, and the studied omission of such conclusions in the other, while neither the assertion nor the omission of such conclusions determined the character of the suits. The court should have looked to the answers filed and the issues joined in the trial of the cases in determining the character of the actions, and character of liability of these defendants.

ASSIGNMENTS OF ERROR.

In the trial of these cases each of the plaintiffs in error has made separate assignments of error, as will be seen in the printed record, but such assignments of error are the

same for each plaintiff in error except in the Bailey case, in which the defense of former adjudication is involved, and an assignment of error on the question of former adjudication is made in his case, and relied upon by him in addition to the other assignments relied on by all of the plaintiffs in error.

The plaintiffs in error each rely upon the following errors in the decision of the State Court:

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

3. The Court has erred in deciding that the petition filed by the defendants in error as its cause of action sets
235 forth a common law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised
236 Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act

as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National bank are personally liable for false reports made and published by them, in pursuance of Section 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could mantain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Section 5234 and 5236 of the National Banking Act.

237 11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without

regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

238 14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

IN THE BAILEY CASE.

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in
236 error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 63 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provision of the constitution of the United States, Article 4, Section 1.

ARGUMENT.

I.

The Damages an Asset of the Bank.

If it be true, that the defendants acting in their official capacity as directors of the Capital National Bank mismanaged the bank in the various ways alleged, and wasted the assets of the bank by reason of the neglect of their duties under the law and the by-laws of said bank, and from which neglect of duties the bank became insolvent, and, as alleged in the petitions, "such insolvency resulted from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its business," then the damage resulting was an asset of the bank.

Being an asset of the bank the damage could not be recovered by the individual depositors who lost money in the failure of the bank.

The damages could only be recovered by the bank, or the receiver of the bank, for the benefit of the creditors.

In Conway vs. Halsey, 44 N. J. Law, 463-464, it is held that:

"A National bank corporation is a distinct person in law in whom the corporate property is vested and to whom all its agents and officers are responsible for all torts and injuries diminishing or impairing its property. * * * That all sums which could in any form be recovered on that account would be assets of the corporation and be applied in the first instance to the payment of the debts, the surplus only being distributed among the stockholders. Thompson on Liability of Directors, 351; Field on Corporations, sec. 328."

The Court of Appeals in the first cases brought against these same defendants, 63 Fed. 491, said:

"The petition shows that the bank of which the defendants are officers and directors, is insolvent and has passed into the hands of a receiver appointed by the Comptroller of the Currency under the National Banking Act. The liability of the defendants, whatever it may be, for the acts complained of in the petition is an asset of the bank belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated in whole or in part by a single creditor to the exclusive payment of his own claim. It is the policy of the National Banking Act to secure the ratable distribution of the assets of an insolvent National bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of, they are liable at the suit of the receiver who is the statutory assignee of the bank and the proper party to institute all suits for the recovery of the assets of the bank of whatever nature to the end that they may be ratably distributed among its creditors. Rev. Stat. U. S., sec. 5236. Kennedy vs. Gibson, 8 Wal., 498; Bank vs. Colby, 21 Wal. 609; Hornor vs. Henning, 93 U. S. 228; Stevens vs. Overstoltz, 43 Fed. 771; Bank of Peters, 44 Fed. 13. The law will not allow one creditor to appro-

priate the whole liability of the directors to his own benefit. It is well settled that the injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common and not an injury for which a single stockholder can sue. Smith vs. Hurd, 12 Metc. 371; Howe vs. Barney, 45 Fed. 668. The same rule applies to the creditors of a corporation."

In Kennedy vs. Gibson, 8th Wall., 506, it is held:

"The claims of creditors may be proved before the Comptroller, or by suit against the association. Creditors must seek their remedy through the Comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits."

In the case of Cockerell vs. Cooper, 86 Fed. 13, it is held:

"The directors of a bank, being agents of the corporation, are bound by the law of agency to act within the scope of the bank's charter and by-laws, and to exercise at all times a reasonable degree of care and diligence in the discharge of the duties which they have been appointed to perform. If they are guilty of a culpable violation of this obligation and the corporation thereby sustains damage, the directors are personally liable therefor to the corporation while it is a going concern and to its receiver when it has become insolvent."

Hornor vs. Henning, 93 U. S. 228.

If the plaintiffs can maintain these suits and recover from the directors and appropriate all their property to the satisfaction of the personal claims of plaintiffs, it necessarily follows that every other creditor as well as every stockholder of the bank could, for the same reasons recover from these defendants. So that as held by Chief

Justice Shaw in the case of Smith vs. Hurd, 12 Metcalf, 371, there might be as many actions and recoveries as there were creditors or shareholders for one and the same default of the directors. If this can be done, the policy of the National Banking Act, providing for a ratable distribution of all of the assets among the various creditors, would be defeated, and the assets in the nature of such damage be wasted in fruitless and expensive litigation and in the multiplicity of suits.

If these suits can be maintained, and recoveries had for the personal benefit of the plaintiffs, it follows that the directors at the time of the failure of the bank and since, had the *right to pay the plaintiffs the amount of their respective claims;* and having that right, they could, for whatever reasons they saw fit, prefer these plaintiffs as favored creditors and give them the whole amount of their claims, even if it rendered the defendants unable to pay the claims of other similar creditors. But this would be a direct violation of Section 5242 of the National Banking Act, holding all such preferences and attempts at preference of one creditor over another to be utterly null and void; and it would defeat the ratable distribution of the assets of the bank as provided in Section 5236.

On this point see the case of Gatch vs. Fitch, 34 Fed. Rep. 569.

In the case of Davis vs. Elmira Savings Bank, 161 U. S. 284, the court in discussing the question says:

"It cannot be doubted that one of the objects of the National bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of National banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. The public aim in favor of all

citizens of every state of the Union is manifested by the entire context of the National Bank Act."

In National Bank vs. Colby, 21 Wall. 609, 613, 614, the Court said:

"As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank.

"The fifty-second section (evidently meaning Sec. 5242) further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void.'

"There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue, a deposit of bonds of the United States, and by giving to the Government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

"This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings."

If the plaintiffs, in their action, can hold the directors personally liable to them in actions of deceit for violations of duty in the attesting of official reports to the Comptroller, every other creditor could proceed in the same way and exhaust all of the property, and the ability of the directors to pay, and thus prevent the enforcement of the double liability of the directors as stockholders as provided for in the National Banking Act, and also defeat the statutory liability imposed by Section 5239.

The Cases Were Tried as For Mismanagement.

From the foregoing it will be seen that these causes of action are grounded upon the charges of negligence and mismanagement of the Capital National Bank by the officers and directors in their official capacity. Not only so, but the causes were tried upon the charge of negligence, misfeasance and mismanagement. Three weeks of time were consumed in getting the proof before the court and jury in extensive details of facts concerning the character of the assets of the bank, and in attempting to show misconduct on the part of the managing officers of the bank in making bad investments and loaning vast sums of money without proper security; declaring and paying dividends out of the capital of the bank when there were no net profits; and to show the careless manner in which the President and Cashier handled the funds and assets of the bank and caued its insolvency, by reason of which the bank was not able to pay its debts and passed into the hands of a receiver appointed by the Comptroller of the Currency.

Not only so, but the trial involved the management of the old Marsh National Bank, managed by Mosher and Outcalt, but with which none of the defendant directors in these cases were connected; and also the management of the Capital National Bank long before, as well as long after the issuance of any of the reports complained of in these cases; and the examination did not stop even with the failure of the bank, but ran on into the manner and method of handling the assets of the bank by the receiver.

Only two reports were set out in the pleadings, one of December 28, 1886, and one of December 9, 1892, but the whole history of the Marsh National as well as the Capital National banks and of the receivership after the failure,

was developed before the jury to show that the directors violated their oaths, to the effect that they would not "knowingly violate nor willingly permit to be violated any of the provisions of the Statutes of the United States under which said association has been organized," and for more than the whole period of the bank's existence.

In the trial the investigation was not confined to the alleged false statements of the bank's condition, but covered the history of the bank and its transactions long before and after the reports complained of.

In order to show that the directors violated their duties in the management of the bank, the oaths that were yearly taken by each of the directors and forwarded to the Comptroller of the Currency were procured and produced in evidence for several years prior to the failure of the bank. Some of the oaths may be found on page 7, and following, of the bill of exceptions. These were used in connection with facts about mismanagement, to show that the directors had violated their oaths, they having sworn that they would not "knowingly violate nor willingly permit to be violated any of the provisions of the Statutes of the United States under which said association has been organized."

This long investigation extending over three weeks followed by proof tending to show, or introduced for the purpose of showing, that the directors, acting in their official capacity as directors of the Capital National Bank, were guilty not only of neglect of their duty as covered by their oaths under the United States Statute, but also for positive and affirmative acts of wrongful distribution of the capital of the bank in dividends to the stockholders, and the careless investment of the assets in worthless bills and notes, and business enterprises.

The bill of exceptions consists of 349 pages of closely printed matter, and a mere glance at any page of said document will show the constant effort, by long tables of figures, and the testimony of witnesses concerning records and bank accounts, bad debts and unsecured loans, to show mismanagement of the bank.

In accordance with the manner of the trial for mismanagement, the trial court instructed the jury on the liability of the defendants by reason of the mismanagement of the bank, as follows:

In the fifth paragraph of the instructions the court reviews the issues and explains to the jury what the plaintiffs claim, as follows (page 24, Bailey Tr.):

"That by reason of the worthlessness of said assets and by reason of the excess of the liabilities, and by reason of the management and inattention and gross negligence of the defendants, the said bank about the 21st day of January, 1893, suspended business, closed its doors and was taken possession of by a receiver; and that by reason of the premises the plaintiffs lost the sums of money severally at that time on deposit in said bank, as heretofore set forth."

In the 16th paragraph of the Court's instructions, the jury are told as follows (page 28, Bailey Tr.):

"You are instructed that proof that the president or cashier misappropriated or embezzled funds of the bank or falsified the books of account, is not of itself sufficient to establish *actionable negligence* against the directors who have not participated therein; but if such embezzlement or misappropriation or falsification are of such great extent and are of such long continuance as would upon reasonable examination challenge the attention of an ordinarily prudent business man, then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement and falsification."

Again in the 17th instruction, the jury are told as follows (page 28):

"It is the duty of the bank officers and directors to give to the affairs of a bank such reasonable care and supervision and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others."

So far as anything appears in the trial of the cases and the verdicts of the jury, the instructions of the court to the jury directing their attention to the mismanagement of the bank and the damages resulting therefrom, the jury gave effect to these instructions in their verdicts representing the amount of damages growing out of the alleged negligence of the directors in the mismanagement of the bank.

II.

National Banking Act, One Complete System.

In the passage of the National Banking Act Congress provided for one complete system for the government, control and management of National banks.

No State legislature, nor any State Court, can in any manner interfere with the system adopted, nor the purposes for which National banks are organized, nor to divert or change the distribution of the assets of a National bank in a manner that would conflict with the provisions of the National Banking Act. That which is beyond the plane of State jurisdiction by direct legislation cannot be brought within such plane by indirection, and therefore the directors of a National bank cannot be held by a State court responsible for acts done in their *official capacity*, so as to enforce a different liability from that imposed upon them by the National Banking Act. If

that were permitted it would be possible to control or nullify a United States law and prevent the enforcement of its provisions.

In re Waite, 81 Fed. 371.

In the case of Cook County National Bank vs. United States, 107 U. S. 448, it is said:

"We consider that act as constituting by itself a complete system for the establishment and government of National banks prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; * * * their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and their debts paid, or their property applied toward such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, and winding up of the institutions, and the distribution of their effects, are fully provided for as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

In Leisy vs. Harden, 135 U. S. 100, the Court said:

"Where the subject matter requires a uniform system as between the States, the power authorizing is vested exclusively in congress, and canot be encroached upon by the States."

Farmers' National Bank vs. Dearing, 91 U. S. 29.

In this case the Court said:

"National banks organized under the National Banking Act are instruments designed to be used to aid the Government in the administration of an important branch of the government service. * * * Being such means brought into existence for this purpose, and intended to be so employed, the state can exercise no control over them nor in any wise affect their operation except in so far as

congress may see proper to permit. * * * It must be borne in mind that the constitution of the United States and the laws that shall be made in pursuance thereof *are the supreme law of the land, and that this law is as much a part of the law of each state and as binding upon its authorities and people as its own local constitution and law.*"

This court in reviewing the case of Easton vs. Iowa, 188 U. S. 220-239, considers the provisions and purposes of the National Banking Act, and concludes as follows:

"It thus appears that congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute."

The court further says:

"Our conclusions upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

In the case of Zinn vs. Baxter, 65 Ohio St. 341, the court considering a similar case, it is said:

"But it is urged that at common law, and under the rules of equity, a shareholder may maintain an action

against the directors for such damage as he has individually sustained by reason of the wrongful acts of the directors, even though the same acts damnify all the stockholders in the same degree as they did him, and even though the corporation is a going concern, and has not been dissolved. The error of this contention lies in supposing that the statutes, the common law, and the rules of equity may well be invoked in the same case, and that where one may be found too narrow, the other may be called in to help out, and that the right of action is given partly by statute, partly by common law, and partly by the rules of equity. *The correct ruling is that, as congress has legislated upon the subject, and given and defined the right of action, the right thus given by congress is the only right, and that the action must be maintained under the act of congress or fail; and that the liability of the directors of a national bank is measured by that act alone, and cannot be enlarged or changed by the common law or rules of equity.*"

In the case of McCulloch vs. Maryland, 4 Wheat. 424, Chief Justice Marshall in considering the effect of a national law of Congress, regulating duties under such law, as compared with duties under a State law or the common law, used this language:

"There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

It will thus be seen that the liability of the directors provided for by Section 5239 are not only fixed and limited, but are exclusive under the law; and to permit recoveries from the directors, in pretended actions for deceit, would defeat the object and nullify the provisions of the law of

Congress under which the directors were acting in doing the things complained of.

III.

Since the judgment cannot be sustained on account of mismanagement of the bank, can it be sustained by reason of the facts alleged for deceit in the making of reports to the Comptroller of the Currency and having the same published in the newspapers as required by the National Banking Act?

If the judgment can be sustained on account of fraud and deceit in the making and publishing of the reports, can the directors who attested the reports be deprived of the protection given to them as directors of a national bank by section 5239 of the National Banking Act, which grounds their liability upon guilty knowledge of acts done in violation of said law?

The acts complained of were things done, or neglected to be done, by the directors in the execution of "their duties under the law as well as the by-laws of said bank," whereby the bank became insolvent and unable to pay its debts. The deceit complained of is alleged to have grown out of the alleged false statements attested by the directors in their official capacity as the directors of a national bank, and while acting as such directors in attesting, and the publication of the reports made by the managing officers of the bank to the Comptroller of the Currency.

The reports were made and attested as required by section 5211, Rev. Stat. U. S., being a part of the act governing national banks for the purpose of showing the condition of the bank. It was made the duty of the managing officers of the bank who prepared the reports to verify the

same by their oaths, and the law required that when thus made and verified, they should then be attested by three directors.

These actions are personal actions against the individual directors for damages growing out of their alleged violation of their duties under the law and the by-laws of a national bank.

By section 5239 of the National Banking Act the directors were made personally liable for damages sustained by the bank, or any other person where they "knowingly violated, or knowingly permitted" the officers to violate any of the provisions of the National Banking Act.

There is no dispute in these cases, of the fact that the statements complained of in the petitions were the reports made by the managing officers of the bank to the Comptroller of the Currency and attested by some of the directors. They were the national bank reports that were relied upon by the plaintiffs below; they were brought from the Comptroller's office and introduced by the plaintiffs as evidence in their cases. The plaintiffs produced H. J. Whitmore, an expert bank examiner, who testified that the statements introduced were the reports made to the Comptroller of the Currency and published in the newspapers.

On page 275 of the bill of exceptions he was asked and answered the following questions:

Q. "The statements that you have testified to, are the statements that are required to be made under the banking act of Congress to the Comptroller and published in the newspapers?"

"Mr. Thomas (attorney for the plaintiffs below): The plaintiffs object as calling for a conclusion, an opinion of the witness, not proper cross-examination, not the best

evidence, and it is an *attempt to inject a federal question* into the issues in these cases, and immaterial by what law, and by what authority it is required."

Objection overruled.

A. "They were such statements and reports."

This effort to evade the facts, makes plain the legal fraud attempted to be perpetrated in evading the law governing the liability of the defendants growing out of their official acts as directors of a National Bank as alleged by the plaintiffs. The protection of the law governing the liability of the defendants for acts done in their official capacity is a substantial right, and the "courts should be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

Justice Miller, in case of Arapahoe Co. vs. R. R. Co., 4 Dill. 277.

IV.

There were no other reports or statements, either verbal or written, made by any of the defendants on which these cases could be based.

It is true that it is alleged in the petitions that the plaintiffs had conversations with the defendants and that the defendants represented that the bank of whch they were directors was thoroughly sound, safe and solvent, but in the trial of the cases, *each one of the plaintiffs below denied that there were any such conversations or verbal representations.*

The evidence on this point by the Staplehurst bank is given by Jacobs, the President of the bank, on page 158 of the bill of exceptions.

The evidence of the plaintiff Bailey, to the same effect, will be found on page 175.

The evidence of Fritz Beckard the President of the Utica bank will be found on page 181 of the bill of exceptions.

Jones was President of the Jones National Bank, and on page 193 of the bill of exceptions he testified that the reports showing the condition of the Capital National Bank were published five times each year. And on page 194 he says, that "these statements were the principal thing that all business men relied upon; *that he had no other means of knowing the standing of the bank whatever,* any more than the names signed to the statements lend to a statement."

It is thus made clear that if an action for fraud and deceit can be maintained on the charges made by the plaintiffs against the directors, such charge of fraud and deceit is embodied in and based upon the reports that were made by the managing officers of the bank to the Comtroller of the Currency and attested by the directors.

The State Court concedes this fact, and accordingly held (page 55, Bailey Transcript):

"The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 Rev. Stat. U. S., to the party injured thereby, and the right of the injured party to maintain the action does not rest on the federal statute, but on the common law."

It will be noticed that the State Court is directly construing the National Banking Act, concerning the reports that were made *"in pursuance of section 5211,"* and holding the directors of a national bank personally liable in an action of deceit where such reports were attested honestly and in good faith, believing that they were true.

The State Court makes this construction in face of the

fact that the liability of the directors is fixed by section 5239 of said Act, only, where they knowingly violate," or "knowingly permit" the violation of some provisions of the National Banking Act.

If the National Banking Act applies to the official acts of the directors in attesting the reports to the Comptroller, made *in pursuance of said law,* and that by said law their liability is fixed and determined by their knowledge or want of knowledge of the falsity of such reports, then it seems to us clear that the construction put upon said federal law by the State Court is erroneous.

In determining the character of the act of the directors in attesting the reports prepared by the managing officers of the bank, it is well to consider the official process of making such reports and the manner of attesting the same.

The record shows that Mosher and Outcalt were the President and Cashier of the bank. They had acted in that capacity for a great many years. First for the Marsh National Bank, with which the defendants had no connection, and subsequently with the Capital National Bank. Both of these men stood high as financiers, and had been very successful for a period of about 14 years. They were implicitly trusted by people generally in Lincoln and in Nebraska. When these defendants became connected with the bank, a finance committee was appointed to look carefully after the loans and discounts. That committee consisted of two directors, Stuart and Holmes. This committee and the bank officers and clerks were trusted implicitly by these plaintiffs in error. As directors they were not required to be book-keepers or to possess the expert or technical knowledge of book-keeping usually adopted by the executive officers of a bank. When they attested the bank's reports they did it as the act of or-

dinary men, or men of ordinary and common intelligence. There were no personal representations made to the plaintiffs below, either in the reports or otherwise. The report simply consisted of a statement of the assets and liabilities. The amount of the assets balanced with the amount of the liabilities. There was no representation concerning the character of the assets and according to the statements from the bank's books the amount of the assets and liabilities were in every instance corectly stated. The only proof shown in the record in the trial of these cases affecting the reports, related to discrepancies between the reports and the bank's books. But they grew out of the fact that the reports had to be made on blanks furnished by the Comptroller of the Currency and the classification of the accounts of the bank to be stated in the reports was different from the classification in the bank's books. Some of the items under one heading in the books had to be placed under another in the report, in order to fit the classification indicated in the headings in the printed blanks furnshed by the Comptroller.

Yates, Thompson and Hamer trusted the managing officers of the bank the same as other business men trusted them, and when the bank failed these three directors lost more money on deposit in the bank than did any one of the plaintiffs below. So far as Mr. Thompson is concerned, he lost a far greater amount on deposit in the bank than did any other one concerned with this litigation. These three directors showed their honesty and good faith by the deposits of their own personal accounts.

In the case of Briggs vs. Spaulding, 141 U. S. 132, it is decided in substance, that directors of a national bank are not insurers of the fidelity of its agents whom they have appointed, and are not responsible for losses resulting from the wrongful act or omission of other directors

or agents unless the loss is a consequence of their own neglect of duty. They must exercise ordinary care and prudence; such degree of care as ordinarily prudent and diligent men would exercise. Knowledge of all the affairs of a bank, or what its books or papers show cannot be imputed to a director for the purpose of charging him with liability. The three directors for whom we appear were all busy men, at their own private business.

Mr. Thompson was superintendent of a railroad, and manager of a Gas Company, and other institutions, and much of the time was in poor health, and absent in Europe.

Mr. Yates was superintendent of a Telegraph line.

Mr. Hamer was a doctor in the active practice of medicine and surgery.

Thompson attested but one of the reports set out in the petitions, and but three others which dated back many years before the failure of the bank.

Dr. Hamer never attested any of the reports except one, and that was a report of date September 25, 1891, which is not one of the reports set out or relied upon in the plaintiff's petitions.

It has been held that a director who did not attest a report relied upon for cause of action, cannot be held *personally* liable for anything stated in such report. Pier vs. Hammond, 86 N. Y. 95; Gerner vs. Mosher, 58 Nebr. 145.

In the latter case the court said:

"The corporation may be bound by the act of its constituted officers, but when it is sought to charge officers *individually* for *ultra vires* acts, or for misconduct, it is

only those who participated therein who are liable, in the absence of course, of conspiracy or indirect participation, which was here not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips and Hamer, it follows that the judgment must be affirmed."

(The judgment below was in favor of all of the defendants.)

And yet in the trial of the cases under consideration, the court instructed the jury, page 27 of the Bailey transcript, that if a director was in town and able to be about when the report was made, that fact could be considered by the jury in determining his knowledge of fraud, as follow

"13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the City of Lincoln, was in a condition of health to be about, giving his ordnary attention to business, and was not absent from home, that is absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank."

The highest court of that state approved this instruction by affirming the judgment of the trial court.

That court went further, and held, page —:

"It is no defense to an action of that character (deceit) that such reports were made and published by the officers without knowledge of their falsity. * * * and the fact that they made and published them without knowledge of their falsity is no defense."

This holding utterly ignores the protection of section

5239 of the National Banking Act, making the directors personally liable only where they "knowingly violate or knowingly permit any officers of the bank" to violate the provisions of the Act

It is held in the case of McDonald vs. Williams, 174 U. S., at 406:

"One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge."

There is no reason of public morals or private security that demands such a rule or construction, and the reputation of honorable men should not be lightly smirched with a charge of deceitfulness and wrong doing without any pretense of proof. The words "knowingly permit" ought not to be tortured out of their plain and ordinary meaning, which happens also to be their technical etymological signification, as evidently intended and used by congress. They are not synonymous with "suffer" or "allow," but express a positive acquiesence. One cannot positively acquiesce in anything of the very existence of which he is ignorant. It cannot therefore be truthfully contended that a director, whose personal innocence is admitted or shown by the proof, knowingly permitted the making and publishing of the alleged false reports.

The Supreme Court of the State of Ohio held:

"The directors of a bank are not held as a matter of law to know all its affairs or what its books and papers would show, and such knowledge cannot be imputed to them for the purpose of charging them with liability."

Mason vs. Moore, 73 O. St. 275.

Again on page 290:

"They were not required to be book-keepers or to possess

the expert or technical knowledge of book-keeping usually adopted by the executive officers of such association. When they attested the bank's reports they did it as the act of ordinary men, or men of common or ordinary intelligence. The reports had two purposes; primarily to inform the Comptroller of the condition of the bank as to its resources and liabilities, and its publication is for the information of the stockholders and the general public. There were no personal representations made to the plaintiff."

We have heretofore shown that in the decision under consideration, the state court held that the officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 of the National Banking Act.

And it also appears from the evidence, without any dispute, that the reports complained of were the reports made in pursuance of section 5211, and that there were no other statements, verbal or written, on which these causes of action are based.

When the state court held that the defendant directors were liable to the plaintiffs who had deposited their money in the bank, for alleged false statements in the reports to the Comptroller without *knowing* or *having knowledge* of the falsity of such reports, such holding is in direct conflict with the personal liability imposed upon the directors by section 5239 of said Act.

But the state courts are as firmly bound by the laws of congress as are the Federal courts.

It was held by this court in Farmer's National Bank vs. Dearing, 91 U. S. 29, that:

"It must be borne in mind that the Constitution of the United States and the laws that shall be made in pursu-

ance thereof, are the supreme law of the land and that this law is as much a part of the law of each state and as binding upon its authorities and people, as its own local constitution and laws."

It is further held by this court in the case of Robb vs. Connelley, 88 U. S. 637, that:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard enforce and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny any rights, privileges, or immunities secured by the constitution and the laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final conclusion and determination."

The State Court holds in an action for fraud and deceit based upon the reports to the Comptroller of the Currency, that the liability of the directors by attesting such reports, is governed by the rule of the *common law*, instead of by the federal statute, in pursuance of which such reports were made; and that under the common law the directors would be held liable in an action for deceit even though they were honest, and acted in good faith, and believed the reports to be true and correct.

We contend that the State Court erred, not alone in denying to the directors the protection of the federal law in pursuance of which the reports were made, which law imposed liability upon the directors only where they

knowingly violated the provisions of said law, but also in holding that at common law *scienter* is not a necessary element in an action for fraud and deceit.

The common law is in full force and effect in Nebraska and has been since before its organization as a State. While yet a territory the legislature passed an act as follows: (Compiled Statutes of Nebraska)

"1934. So much of the common law of England as is applicable, and not inconsistent with the constitution of the United States, with the organic law of this Territory or with any law passed or to be passed by the legislature of this Territory is adopted and declared to be law within said Territory." Sec. 1934, Ch. 15a, page 501, Annotated Statutes 1903.

No law has been passed in Nebraska conflicting with this provision and it is recognized and enforced by numerous decisions of the highest court of the State.

It was clear to the State Court in deciding these cases that the plaintiffs in their individual capacity could not recover judgment against the directors for mismanagement of the bank, as such damages were an asset of the bank recoverable only by the bank or its receiver.

It was further made clear to the court that no recovery could be had against the directors for deceit, if section 5239 governed their liability, because there was no proof of fraud or any knowledge of the falsity of the reports.

And it was further made clear to the State Court that no recovery could be had against the directors at common law unless the court should hold that *scienter* was not a necessary element in an action for fraud and deceit. There were no facts showing any fraud or knowledge on the part of the directors that the reports were false. The Court in its opinion said:

"We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case, but as was said in Gerner vs. Mosher, 58 Neb. 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense."

The logical result left no ground upon which the directors could be held liable, except by overturning the rule of liability as prescribed in the National Banking Act, as well as the long established rule of the common law, that *scienter* is a necessary element of recovery in an action for fraud and deceit.

The proposition that the directors could be guilty of fraud and deceit without knowing of any fraud, and while innocent of any purpose to deceive, is so subversive of the fundamental principles of law and justice between men, as to at once challenge the correctness of the court's decision. No principle of law is better established, recognized and enforced than that all men are presumed to be innocent until proven guilty.

One of the early decisions establishing the common law rule on *scienter* is the case of Derry vs. Peek, 14 App. Cs. 337. Lord Watson (at page 345), speaking of the opinion of the Judges of the Court of Appeal, said:

"They seem to have held that a man who makes a representation with a view of its being acted upon in the honest belief that it is true, commits a fraud in the eye of the law, if the court or jury shall be of opinion that he had no reasonable grounds for his belief. I have no hesitation in rejecting that doctrine for which I can find no warrant in the law of England."

Lord Bramwell (page 347) after stating that a misstatement of a fact honestly made may constitute *equitable*

ground for rescinding a contract, holds that to found an action for damages there must be fraud:

"The statement of claim in this case states fraud. Of course that need not be proved merely because it is stated. But no one ever heard of or saw a statement of claim or declaration for deceit without it. There is not an authority at common law, or by a common law lawyer to the contrary; none has been cited, though there may be some incautious, hesitating expressions which point that way."

Lord Herschell (at page 367), quotes from an authority as follows:

"It is insisted that even that (the gross negligence which the jury had found) accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be *fraudulently made*. But then it was said in order to constitute that fraud it was not necessary to show that the defendants *knew* the fact they stated to be untrue, that it was enough that the fact *was* untrue if they communicated that fact for a deceitful purpose, and to that proposition the court is prepared to assent. It is not necessary to show that the defendants *knew* the fact they stated to be untrue. If they stated a fact which was untrue *for a fraudulent purpose*, they at the same *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

Lord Herschell said of this:

"Now it is impossible to conceive a more emphatic declaration than this, that to support an action of deceit, fraud must be proved, and that nothing less than fraud will do."

At page 375, Lord Herschell further said:

"In my opinion making a false statement through want of care, falls far short of, and is a very different thing

from fraud, and the same may be said of a false representation honestly believed through insufficient grounds."

In Kountze vs. Kennedy, 147 N. Y. 124, the court recognizing this well established principle said:

"The principle has been obscured by the use by judges of the phrase 'legal fraud,' which has sometimes been interpreted as meaning fraud by construction, and so indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it."

Pomeroy in his second volume on equity jurisprudence, section 884, states the rule as follows:

"It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some *moral* delinquency; there is no actual fraud, *legal* fraud which is not also a moral fraud. This immoral element consists in the necessarily guilty knowledge and consequent intent to deceive—sometimes designated by the technical term, *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time he makes it."

In the case of Lord vs. Goddard, 13 How. 211, it is held:

"The gist of the action is fraud in the defendants and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly gives his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue: * * * The simple fact of making the representations which turn out not to be true, unconnected with a fraudulent design, is not sufficient."

In Warfield vs. Clark, (Ia.) 91 N. W. Rep. 833-4, it is held:

"That in an action against the Secretary of an insurance company for deceit consisting of false representations contained in its official statement, an instruction that defendant was charged with knowledge of the true condition of the company, and if the statement filed by him was not correct, it was untrue and false, and so known to be by the defendant, was erroneous, since the action could be maintained only on proof of *active, conscious and intentional fraud.*"

In the case of Runge vs. Brown, 23 Neb. 817, it is held:

"In order to maintain an action for deceit, it is not only necessary to establish the telling of an untruth, *knowing it to be such*, but it is equally necessary that it be shown that the plaintiff had a right to rely, and did rely, upon the representations made, and that he altered his condition in consequence thereof, and suffered damages thereby."

It is true that the Nebraska court held at a later time, in the case of Gerner vs. Mosher, 58 Nebr. 135, by a divided court, that proof of scienter is not necessary to the recovery in an action for deceit; but we think that this decision is against the great weight of authority, both federal and state, and stands almost alone among the decisions of the United States.

V.

There is no ground on which the State Court's decision can be sustained independently of the Federal question, and the rights and liabilities created by the National Banking Act.

There is no statement nor representation made for the basis of the action for deceit other than the reports made to the Comptroller of the Currency in pursuance of sec-

tion 5211 of the National Banking Act, and in attesting these reports the directors acted in their official capacity as directors of a national bank duly organized under the national banking law.

If the attesting of such reports furnished the basis of an action for fraud and deceit, then the act of the directors in thus attesting the reports must be judged by the law in pursuance of which the reports were made. Their liability depends upon their guilty knowledge of the violation of said law. The case made shows conclusively and without any dispute that the directors were innocent of any fraud, deceit or guilty knowledge. On the question whether they knew the reports attested were false the state court said:

"We are satisfied that such is not the case, but it was their duty to know whether the statements made by them were true and the fact that they made and published them without knowledge of their falsity, is no defense."

In thus holding that court denied to the directors the protection given them by the law under which, and in obedience to which they acted in attesting the reports. To reach such a decision that court either had to ignore the federal banking law or decide the case directly contrary to its provisions.

The liability of the directors for deceit without knowledge is so violative of the liability imposed by section 5239, that it seems impossible that congress contemplated any such liability in the passage of the National Banking Act.

The State court in its decision (page 59 of the Bailey transcript), in considering the character of the suits, said:

"It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but

they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegations may be contained in the petition, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question."

But the jurisdiction of this court is not defeated by an arbitrary statement by the state court in its decision that no federal question is involved, and that its decision is based upon the common law independent of the federal statutes. As we understand the law, in determining the jurisdiction of this court, it will look to the issues joined between the parties, and the trial of the questions at issue in the case, to determine whether any federal right or immunity specially set up or claimed, has been denied, and will not be governed by the assertion of the state court that no federal question is involved in the decision, nor by the assumed *intentions* of the pleader in alleging his cause of action.

In the case of Chicago R. R. Co. v. Illinois, 200 U. S. 562 at 580, this court held that its jurisdiction is not defeated by the fact that the state court in its judgment necessarily denied the fact of the federal right involved, where, if the federal right or immunity specially set up has been recognized and enforced, and a different judgment should have been entered from one that rested solely upon some local or general law. And, further that the necessary result could not be avoided by the state court,

merely by silence on the federal question, or by giving as a reason, in its judgment, some principle of common law.

It will be noticed that the state court did construe the federal law relied upon by the defendants as a defense, but as we contend erroneously held that the federal law did not apply, but that the issues joined were governed by the rule of the common law.

In the case of M. K. & T. Ry. Co. vs. Elliott, 184 U. S. 533, speaking of this question, the court said:

"The fact that the state court, whilst deciding the federal question, erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-federal in its character."

VI.

Former Adjudication.

In the case brought by Thomas Bailey in Seward County the defendants pleaded a former adjudication of the same cause of action in the case first brought by Bailey in Lancaster County District Court.

The petition filed by Bailey in the Lancaster County case will be found on page 258, bill exceptions.

To this petition the defendant Yates, Hamer and other directors, filed a demurrer for the reason that on the facts alleged, the plaintiff in his individual capacity was not entitled to recover; that the plaintiff was not a proper party to recover the damages sued for; and the petition

does not state facts sufficient to constitute a cause of action in favor of plaintiff against the defendants. The demurrer will be found on page 273 of the bill exceptions.

Subsequently that case was removed to the federal court, motion to remand overruled, the demurrer ruled on and sustained, and the cause of action dismissed with judgment against the plaintiff for costs. The record of such judgment and entry will be found on pages 255-257, of the bill of exceptions.

That judgment was never set aside, vacated, nor appealed from, and stands and remains in full force and effect. It is found on page 256 of the bill of exceptions, as follows:

"And whereas, in the present term of May in the year of our Lord one thousand eight hundred and ninety-four the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause, be and the same is hereby affirmed with costs; and that Charles W. Mosher, Homer P. Hamer, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart and Richard C. Outcalt recover against Thomas Bailey the sum of twenty dollars for their costs herein and have execution therefor."

The state Supreme Court in its decision now under consideration refused to give full faith and credit to this judgment, and refused to recognize it as an adjudication of the cause of action as set forth in the Bailey case now under consideration. The assignment of error on this point will be found on page 72 of the transcript in the Bailey case, as follows:

"16. The court has erred in deciding that the judgment

of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in eror herein was plaintiff, and the plaitiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action, and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provisions of the constitution of the United States, Article 4, Section 1."

If the causes of action set forth in the first and second suits brought by Bailey are in effect, the same, then the decision of the state court is essentially wrong on the question of res judicata. The only difference in the two cases relates to legal conclusions, and not to the right claimed nor the remedy sought to be enforced.

In the first, it was alleged that "the Capital National Bank was organized under the laws of the United States."

In the second, that "the Capital National Bank was duly organized," which must necessarily mean, under the national banking law. Walker v. Windsor, 56 Fed. Rep. 80.

In the first, the statements complained of were made in "pursuance of the banking laws of the United States, and on the demand of, and to the Comptroller of the Currency."

In the second, it is alleged that "it was the duty of the defendants under the law as well as the by-laws of the bank" to make true and correct statements.

In the first, it is alleged that "by reason of the several

violations of the banking law as above set forth "these defendants had become liable to the plaintiff for damages.

In the second, it is alleged that the damages claimed resulted "by reason of the facts as above set forth, and the false and fraudulent statements."

But beyond the matter of pleading, the identity of the cause of action is plain in this litigation, and was recognized by the State court in its decision, that the same wrongs and violation of duties, the same alleged right to recover, and the same representations in the national bank statements, are asserted by the plaintiff in the first case which went to judgment, as in the latter action now under consideration.

The State court holds in its decision that the two different petitions are substantially the same, but tries to draw a distinction on account of legal conclusions alleged. In the opinion it is said:

"The petitions in the latter cases as they stood at the time of the trial are substantially the same as those in the former, save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned purporting to show the financial condition of said bank were made in pursuance of the banking laws of the United States or on the demand of the Comptroller of the Currency."

We have already shown that the Capital National Bank could not be duly organized under any other law than that of the National Banking Act.

We have also shown by the record that the statements mentioned in the latter petitions were the reports that were made to the Comptroller of the Currency in pursu-

ance of the banking laws of the United States, and no other statements of any kind were made.

Such fact is conceded by the State Court in its decision where it holds:

"The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5211 Rev. Stat. U. S., to the party injured thereby."

The record shows without dispute that these reports were identically the same in both actions, and that the court in the first action sustained a demurrer filed to the petition and dismissed the cause of action, from which no appeal was ever taken, and the adjudication of that question still stands in full force and effect, whether it was a correct decision or not.

So that whatever cause of action the plaintiff Bailey had in the first petition, he alleged and presented in the second. The questions of mismanagement, fraud and deceit were all jumbled together, and the allegation of facts being the same, or substantially the same, as in the latter cases every point which properly belonged to the subject of the allegations would be covered by the adjudication, without regard to the conclusions alleged by the pleader.

In the case of Gould vs. Evansville R. R. Co., 91 U. S. 533, this court speaking of a similar question, said:

"Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor's Ev., sect. 1513; Henderson vs. Henderson, 3 Hare, 115; Stafford vs. Clark, 2 Bing. 382; Miller vs.

Covert, 1 Wend. 487; Bagot vs. Williams, 3 B. & C. 241; Roberts vs. Heine, 27 Ala. 678."

In the State Court's decision, speaking of the final judgment in the first case brought by Bailey (page 61, Bailey transcript), it is said:

"It does not dispose of the action for deceit on its merits, but on the technical ground that by the averment of mere conclusions of law the plaintiff had committed himself to the theory that the action was of a different character and precluded an examination of the merits of his action for deceit."

If, as we have shown, and which seems to be conceded, the first and second causes of action brought by Bailey were in fact the same, then the sustaining of the demurrer in the first case had the same effect as an adjudication, as a trial had before a jury and a judgment rendered by the court. Admission by the demurrer of all the facts pleaded, had the same effect as an admission by the testimony in a trial.

In the Gould case, at 533 it is said:

"Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. Bouchard vs. Dias, 3 Den. 244; Aurora City vs. West, 7 Wall. 99; Goodrich vs. The City, 5 id. 573; Beloit vs. Morgan, 7 id. 107; Perkins vs. Moore, 16 Ala. 17; Robinson vs. Howard, 5 Cal. 428."

In this case at 534 this court further said:

"Different forms of expression, it may be conceded, are used, in several instances, in the declaration in the last suit, from those employed in the complaint exhibited in the former suit; but the substance and legal effect of the two pleadings, in the judgment of the court, are the same in all material respects. Even without any explanation, it is so apparent that the first and second alleged differences in the two pleadings are unsubstantial, that the objections may be passed over without further remark."

In the last case brought by Bailey some words, sentences, and conclusions of law were left out of the petition, which words and conclusions were contained in the petition in the first case. But there was no new averment or statement of any different fact in the petition in the last case from what had been stated in the petition in the first case.

In the Gould case, *supra* (at page 535), it is said:

"Tested by these considerations, it is clear that the proposition that the defects, if any, in the declaration in the former suit were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument. Ford vs. Peering, 1 Ves. Jr. 78; Lea vs. Robeson, 12 Gray, 280; Redmond vs. Dickerson, 1 Stockt. 507; Green vs. Dodge, 1 Ham. 80.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. Nesbit vs. Berridge, 8 Law Times, N. S. 76; Murray vs. Clarenden, Law Rep. 9 Eq. 11; Story's Eq. Plead. 254b; Ellis vs. Coleman, 25 Beav. 662; Dillon vs. Barnard, 21 Wall. 430."

In conclusion, we contend:

1st. That the state court, in the decision under consideration, has erred in holding that the causes of action in these four cases are not for misfeasance and mismanagement of a national bank by its officers and directors.

2d. That the judgment is in violation of article VI, section 2 of the constitution of the United States making the laws enacted in pursuance thereof the supreme law of the land, binding upon all the courts both state and federal.

3d. It has denied to the defendants the protection of the federal law under and in pursuance of which they acted in doing the things complained of.

4th. It has found the defendants guilty of fraud and deceit in the attesting of reports to the Comptroller of the Currency when they had no knowledge of such fraud and deceit, contrary to the provisions of section 5239 of the Banking Act, by reason of which Act such reports were attested.

5th. The court erred in enforcing a liability imposed upon the defendants by a so-called common law action for deceit, for official acts of the directors of a national bank, done in pursuance of the requirements of the National Banking Act, for which things done as charged, said Act fixed a liability which is exclusive of any common law liability.

6th. In the Bailey case the state court has failed to give due faith and credit to a former judgment of the United States court adjudicating the same cause of action between the same parties, in violation of article IV. section 1 of the constitution of the United States.

Respectfully submitted,

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

FILE COPY.

Supreme Court,
FILED.
FEB 5 1907
JAMES H. McKENN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 230.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK.

No. 233.

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR THOMPSON.

HALLECK F. ROSE,
Of Counsel for David E. Thompson,
Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24402

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PLAINTIFF IN ERROR, DAVID E. THOMPSON.

Statement of the Case.

It is shown in the brief of Messrs. Deweese and Bishop in behalf of all the plaintiffs in error (except Mosher and Outcalt) that the amended petition, on which the cause was tried, stated, or pretended to state, a cause of action for malad-

ministration against the directors of a national banking association. In the State Supreme Court, however, the case was disposed of upon the theory that the petition stated a common-law cause of action for *deceit,* based on false statements of the resources and liabilities of the bank appearing in official reports made to the Comptroller of the Currency. This supplemental statement is intended to embody sufficient of the record to show that defendant *David E. Thompson* presented and litigated in the State courts the issue that *scienter* is an essential element of the cause of action for deceit based upon official acts of national bank directors, made so by the express terms of section 5239 of the Revised Statutes of the United States, and that the State Supreme Court actually adjudged the issue adversely to *Mr. Thompson.* We join in the argument of Messrs. Deweese and Bishop and count upon all the points urged in their brief for plaintiffs in error; but, if the court should be of opinion that the statute subjects directors to common-law liabilities, and to common-law remedies for their enforcement, it is still obvious that section 5239 (Rev. Stat. U. S.), creating such liabilities, in terms narrows and restricts their application to the wrongful acts of the directors done *knowingly* and *willfully.* This point, if meritorious, will, in the case of *Mr. Thompson,* be fatal to the judgment of the State court, even if the general doctrine at its foundation—that the case presents simply the common-law cause of deceit—is approved.

In the case of *Mr. Thompson,* and any of the other directors shown to have had *no knowledge* of any falsity in the published reports, and to have had no intent, purpose, or motive to mislead, deceive, or defraud the depositors or others, there is this meritorious complaint against the judgment of the State court, thus based on section 5239 of the Revised Statutes of the United States, which may not be urged in behalf of Mosher and Outcalt. The latter were the executive officers, in direct administrative control of the bank, and directed and controlled both the financial opera-

tions and the books of account of the association. It is their alleged wrongs that are at the foundation of these suits, and necessarily they had knowledge of their own acts. But, as we shall hereafter show, *Mr. Thompson* was not only wholly without knowledge of the alleged false statements and acts of maladministration charged in the petitions, but was, to a greater extent than any of the complaining depositors, a victim of and a pecuniary loser therefrom. In stating this point it is necessary to exhibit the grounds and theory upon which the judgment of the State court rests.*

The third point of the syllabus of the opinion (prepared by the court) states a rule necessary to maintenance of the judgment as follows (printed Record, p. 87):

"3. It is no defense to an action of that character (for publishing false reports) that such reports were made and published by the officers without knowledge of their falsity. Following *Gerner v. Mosher,* 58 Neb., 135."

Turning to the original authority, which was merely followed and applied to this suit, we find the rule applied to be thus stated in the opinion by NORVAL, J., in *Gerner v. Mosher,* 58 Neb., 156:

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is *wholly immaterial.* * * * That they were innocent of the true situation or condition of the affairs of the bank, is wholly an unimportant consideration, since *proof of a scienter is not necessary to a recovery.* This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown they were intentionally or *knowingly* [the precise term employed in sec. 5239, Rev. St. U. S.] made by

*NOTE.—The record references are to case No. 230, *Yates v. Jones National Bank.* In the other case submitted upon this brief, No. 233, *Yates v. Bank of Staplehurst,* the pleadings of Mr. Thompson are identical, in form and substance, with those in the former case. The two cases were tried together, and heard together in the Nebraska Supreme Court on the same bill of exceptions. The questions presented in the two cases are in all respects identical.

the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation."

Thus the State court, while exercising authority upon the assumption that the National Banking Act, by its own terms (sec. 5239, Rev. Stat. U. S.), subjects bank directors to common-law liability for *deceit* declines to be bound by the limitations of the act which, it is claimed, adopts the common-law action, but in terms makes *scienter* an *indispensable* element.

Recurring to the present record, we find an express holding in the court's opinion (by the State law made part of the record) that some of the defendants *did not know* that the statements complained of were false. We quote from the opinion (printed Record, p. 94):

"We do not wish to be understood to say all the defendants knew that such statements were false; *we are satisfied that such is not the case.* But, as was said in *Gerner v. Mosher,* 58 Neb., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them, without knowledge of their falsity, is no defense."

It is thus demonstrated that the judgment against *Mr. Thompson,* and any other directors in like situation, rests essentially and necessarily upon the right to exclude *scienter* from the elements of the cause. Upon this rule, thus shown to have been applied, and which was embodied in the charge given to the jury, a general verdict does not include an adverse finding on the element of *scienter;* and the holding of the opinion of the State Supreme Court is that such finding could not be sustained, upon the evidence in the record, against all of the defendants.

The ninth instruction given by the trial judge, to which defendants excepted (printed Record, pp. 30-31), was as follows:

"9th. Bank officers or directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, *even though such director or officer did not know that his report so published was in fact false or untrue.*"

The answer of *Mr. Thompson* (printed Record, p. 19) distinctly averred that his duties and liabilities in respect to the matters charged in the petition were defined and controlled by the National Banking Act; in his motion for a new trial, addressed to the trial court, he assigned (printed Record, p. 50):

"7th. The verdict is contrary to law.
"8th. The verdict is contrary to the evidence and is not supported by sufficient evidence.
"9th. The court erred in refusing to give instruction numbered 1, requested by this defendant."

The answer of Mr. Thompson to the amended petition, found in original transcript in Jones National Bank suit, at page 225, is in the same form as that appearing in the printed record in case No. 233, *Yates v. Bank of Staplehurst,* pages 18 and 19. The answer to the amended petition, in asserting the paramount and controlling force of the act of Congress, alleges (printed record in No. 233, case of *Bank of Staplehurst,* pp. 18, 19):

"This defendant for himself alleges that the Capital National Bank of Lincoln referred to in said amended petition, was organized and had its existence under and by virtue of the National Banking Act passed and approved by the Congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank, and the defendant David E. Thompson was a director for a short time in said bank, but was not such director at the time any of the deposits were al-

leged to have been made by the plaintiff in the Capital National Bank, and during such time he was simply a stockholder in said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment. That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for the reason of the violation of the National Banking Act by the directors and officers of said bank, or for any other reason. That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the National Banking Act under which said bank was organized and existing. This defendant denies that he made, signed or attested the report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

"The defendant further says that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constitute a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the National Banking Act concerning the management of national banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said National Banking Act relating to the duties of directors and stockholders of national banks."

While the answers distinctly asserted the controlling force of the Congressional Legislation, it must be conceded that even that formality of pleading was not essential. By force

of the National Constitution that instrument and the acts of Congress enacted pursuant thereto are the supreme law of the land. As such they are, in effect, constituent parts of the public law of each State, binding on all the State courts, and judicial knowledge thereof is enforced upon the State courts.

At the trial defendant *Thompson,* in his own behalf, requested an instruction, numbered 1, as follows (printed Record, p. 43):

"You are instructed that under the issues in this case, and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant David E. Thompson; and you are, therefore, instructed to return a verdict in favor of said defendant David E. Thompson. REFUSED. EXCEPTED TO BY DEF'T THOMPSON. J. W. D. S. H. SORNBERGER, JUDGE."

Upon the foundation thus laid in the trial court, the petition in error, addressed to the State Supreme Court by *Mr. Thompson* (printed Record, p. 7), assigned the following as one ground of error:

"3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69." (Reference is to State record paging.)

The portions of the record exhibited show that the question, whether *scienter* is an essential element of the cause of action for *deceit,* arising here upon the act of Congress (sec. 5239, Rev. Stat. U. S.), was distinctly litigated in the trial court, was presented to the State Supreme Court for review in such form that it was necessarily included in its judgment of affirmance, and was actually discussed and passed upon in the opinion, which distinctly held the evidence sufficient, notwithstanding it found *Mr. Thompson* had no knowledge of the falsity of the statements at the foundation of the suit, because *scienter* was not an element of the cause of action. The

same point is now presented, by the petition in error, to this court (printed Record, p. 102), upon the following

Assignments of Error.

"7. The court has erred in deciding that the fact that those plaintiffs in error, who were directors, were without knowledge of any falsity of the reports attested by them, or some of them, mentioned in the petition, was immaterial, and that such directors, or any of them, were liable under the proofs showing that they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of section 5239 of the Revised Statutes of the United States, which makes liability of the directors dependent upon the fact that they *knowingly violated,* or *knowingly permitted* the violation of the provisions of the National Banking Act, and participated in or assented to *such* violation.

"8. The court has erred in deciding that a common-law action of deceit, based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by directors of such bank, can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act, as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States."

I.

Scienter is, by the common law and by the express terms of section 5239, Revised Statutes of the United States, a necessary and indispensable element of the cause of action for deceit against national bank directors, founded on official reports made to the Comptroller of the Currency.

The holding of the State courts that knowledge of the alleged falsehoods is immaterial, and that scienter is not an element of the cause of action, is the sole support of the judgment against Thompson. This holding of the State courts is plainly violative of section 5239, Revised Statutes of the United States.

There was no attempt to prove that Mr. Thompson personally solicited any deposit from plaintiff, made any personal representations, or participated directly in the business of plaintiff with the Capital National Bank.

H. I. JONES, president of *Jones National Bank*, was the sole witness adduced to show its reliance upon the official statements. He testified (printed Record, p. 194): "Their statements were the principal thing that all business men rely upon. That is what they are made for." He was then asked, "Had you any other means of information than the statements?" to which he answered, "No other means as to the standing of the bank whatever, any more than the names signed to the statements lend to a statement." His testimony thus definitely excludes any personal participation by Mr. Thompson in the business dealings between the two banks.

E. JACOBS, president of the *Bank of Staplehurst*, was the sole witness questioned to show the reliance of that bank upon the official statements. At page 158, printed Record, Jacobs

was asked to name the persons he understood to be the directors of the Capital National Bank, and testified: "A. There was Thompson, Stuart, Yates, Hamer, and I believe Holmes. Q. Did you know any of these men personally? A. No, sir. Q. Had no acquaintance with any of them? A. No acquaintance at all with any of them." So the testimony, offered by both of the banks that sued Mr. Thompson, shows definitely that he did not personally participate in their dealings had with the Capital National Bank. That fact must, therefore, be conceded to be established and not the subject of contention or dispute.

There is no proof that Mr. Thompson had any knowledge that the representations made the basis of the suit were false or untrue in any particular, nor that his knowledge and information gained through his office of director did not indicate to him, as a man of ordinary prudence and business capacity, that the statements were true, nor that they were not attested in good faith upon supposedly creditable information of their absolute verity. While these elements, which we deem necessary to make out a cause of action on any theory in favor of plaintiff, were not covered by any proofs adduced by plaintiff, Mr. Thompson did not rest his defense alone on plaintiff's failure of proofs. He testified as a witness in his own behalf, and his direct testimony, which is not controverted or disputed, demonstrated to a certainty that leaves no reasonable ground for contention, not only that he was without knowledge that the reports were false in any particular, but that every personal act of his own in connection with any report was done in entire good faith, and upon information and representations of their truth and verity that would have been accredited by any person of prudence in a like situation. His testimony is printed in full at pages 220 to 249, bill of exceptions.

Mr. Thompson testified (printed Record, p. 220) that he became connected with the bank when it assumed the name "Capital National Bank," and had no connection with the antecedent organizations of "Marsh Brothers & Mosher" and

"Marsh National Bank." He bought and paid for his stock in full at a premium of 9 per cent., and served as a director without pay, and never at any time held any other office. Asked, at page 221 (printed Record), to what persons the management of the bank was confided or delegated by the directors, witness answered: "To the president and cashier, Mosher and Outcalt, and to the executive committee that was elected for the purpose of supervising the management of the bank, and that committee was made up of W. W. Holmes and Prof. A. P. S. Stuart." His testimony touching the standing of these men is as follows:

"Q. Are you acquainted with what was the standing of C. W. Mosher at that time as a banker and business man in that community? A. Yes, sir; I am.

"Q. Now what was it? A. First class.

"Q. Did you personally regard him as a capable banker? A. I did. Everybody did.

"Q. And as a man of integrity? A. I did and everybody did.

"Q. Do you know what at that time was the standing of R. C. Outcalt in that community? A. He was the same as Mosher, except he wasn't looked upon as being as wealthy as Mosher was.

"Q. What was his reputation for probity? A. It was first class.

"Q. Was he regarded by yourself as a competent, trustworthy banker? ——.

"Q. State how you regarded him at that time as a banker? A. I regarded him very highly as a banker, and considered him and Mosher a very strong team.

"Q. Were you acquainted at that time with W. W. Holmes and A. P. S. Stuart? A. I had known W. W. Holmes 12 years at that time. I had known Professor Stuart a lesser time, I couldn't say for how long, but for several years.

"Q. Do you know what W. W. Holmes' business had been prior to that time? A. Money-loaner.

"Q. Do you know what Prof. Stuart's business was? A. He was a property-owner and money-loaner at that time.

"Q. What was the character and reputation of Mr. Holmes as a business man? A. Both Holmes and Stuart was con-

sidered the very best in Lincoln; their judgment was considered always good; they were both wealthy men, and had made their money by managing money."

Again, at page 223 (printed Record), witness said:

"I never was more astonished over a business matter of any kind, in all my life as a man, than I was over the failure of that bank. * * * I never had occasion to question the integrity of either of those men (Mosher and Outcalt), the business integrity, up until the failure of the bank. I had had some little trouble, personal trouble, with Mosher, but I had never had any business trouble or reason to question him."

At page 222 (printed Record) Mr. Thompson testified that during large parts of the years 1885, 1888, and 1890 he was, by reason of ill health, in Europe, with the knowledge of the other directors. At pages 223 and 224 he testified that from 1884 to 1890 he was superintendent of the Burlington railroad, having eleven hundred miles of track under his charge, and owned and operated a string of nine hotels. In 1890, in addition to the hotels which he still owned at date of trial, he took charge of the Lincoln Gas Company and the Lincoln Electric Company and of the Farmers' and Merchants' Insurance Company. He had been vice-president of the latter company since 1885, but took active charge of it in 1890. All of the other directors knew that he was in charge of these enterprises. He also organized and became president of the Aurora State Bank, and prior to and at the time of the failure of the Capital National was vice-president of the American Exchange Bank of Lincoln. These enterprises of which he had active control made him "a very busy man" and of necessity kept him away from home much of his time. When, in 1890, he resigned the care of eleven hundred miles of the Burlington railroad, most of which he had built, the new enterprises which he took charge of "occupied all of his time," but did not take him so much from home.

Under the conditions just detailed Mr. Thompson testified,

touching his participation in the affairs of the Capital National Bank, his knowledge thereof, and means of acquiring it (pp. 222–223), as follows:

"Q. Now, so far as the duties of administration devolved upon you as a director, state how and in what manner you discharged them. A. Well, first I want to state, I want to say, that I am not a book-keeper. I never had an education except about five years as a child, never went to school except about five years as a child. That would make it impossible for me to know anything of the books of the bank. I think I never was in Lincoln at a directors' meeting or on the day of a directors' meeting that I did not attend it. There never was a time, from the time I went into that bank until it closed, that I did not take every opportunity, after an examination by the bank examiner, to ask him of the condition of the bank. Hayden was the bank examiner soon after the organization of the bank and I knew him well; after Hayden came Griffith and I knew him well. They were both friends of mine, and after each examination, when I saw those men, I always asked how they found things in the bank. Their answers were always to the effect that the bank was all right. There never was any criticism by either of those men to me of the condition of the bank.

"Q. Now, Mr. Thompson, at the directors' meetings, what, if any, steps were taken by you to inform yourselves by statements of the officers or otherwise, as to what was the condition of the bank, and what had been its earnings? A. At every directors' meeting that I attended, as I said before, I think I never missed one when I was at home, the executive committee, or the committee whose duty it was to look after the affairs of the bank, were asked how they found things. They were asked for their statements that they always made on a slip of paper, that was lying there on the directors' table. The officers of the bank prepared their statement of the gross and net earnings of the bank, and it was there that I got all my information of the condition of the bank, from those two sources."

At pages 224 to 228 of the printed evidence Mr. Thompson is shown to have testified unequivocally and directly to the following facts: He had no knowledge that Mosher, under

the name of Western Manufacturing Company, was obtaining funds from the bank or putting paper through the bank for rediscounts or otherwise. He never knew till a receiver had been appointed that the bank was carrying any personal paper of Mosher or Outcalt. He had no knowledge at any time that the deposit account of Mosher and Outcalt was overdrawn. He had no knowledge prior to the suspension that the bank had incurred any considerable losses nor that it was in any financial difficulty. He had deposit accounts with the bank, which he controlled absolutely, at the time the bank failed, including that of the Farmers' and Merchants' Insurance Company, kept in the name of "C. W. Mosher, treas." While this account was kept officially in Mosher's name, Mosher, in actual practice, never drew a check against it and never had authority to do so. Mr. Thompson never made a single entry on any book of the bank and never directed any officer or servant to do so. He never issued nor directed issuance of any certificates of deposit and "never did anything for the bank, except to meet with them as a director and consider things that were brought to our attention, and to help elect the executive committee and officers." He had no knowledge of the certificate of deposit issued in 1891 on account of Nebraska relief fund. He had no knowledge that any false entries of debits or credits were entered in any account on the books of the bank by any of its officers or servants. He had no knowledge of any variance between the amount of any certificate of deposit issued and the corresponding entry on the books. Here we quote literally from pages 227 and 228:

"I never had any knowledge that anything was wrong there until after the bank closed, and my first information came from Griffith (the examiner who, for the Comptroller, took the bank in charge). I met him on the train almost immediately after the failure of the bank, on the train between Lincoln and Ashland. * * *

"Q. This information came to you subsequent to the failure of the bank? A. Yes, sir.

"Q. Did you know about any irregularities or false entries of any character whatever prior to the suspension of the bank? A. None at all."

Acting on the assumption that the plaintiff's petition was not sufficient to raise an issue as to the correctness of any official reports other than the two specifically set forth as exhibits, one made December 15, 1892, and one October 11, 1886, and relying on the rule of pleading that the particular representation must be fully set forth, and that failure in that behalf is a defect in substantive averment that would preclude any recovery upon allegations "that other reports in form similar" were made, counsel confined his examination, touching actual participation, to the only report fully set forth which was within the period of limitations. This report (December 15, 1892; printed Record, pp. 15-16) did not bear Mr. Thompson's attestation. While the fact that Mr. Thompson may have, as the State Supreme Court suggests, attested four of the bank's reports during his long term of service as director is not material upon the issue of *scienter*, it is still shown that, so far as the examination of the witness extended, he did not participate in any manner in the reports not attested by him (printed Record, p. 228); and he never at any time signed any publication notice to be printed in a newspaper (printed Record, p. 228), and the directors were not by the act of Congress required to separately attest the publication notice.

The cross-examination exhibited Mr. Thompson's official conduct more circumstantially and in greater detail. We here quote from pages 229 to 231, the cross-examination, conducted by Mr. Thomas:

"Q. Do you say that you did not sign a report of the condition of the Capital National Bank to the Comptroller under date of December 28th, 1886? A. I think I did not, and I will tell you why.

"Q. You may state. A. Well that is rather a long story but this is it. In 1885 I went to Europe a very sick man, so sick that nobody thought I would come back alive. I got

back in the early winter of 1885 and during the next year this road here was under construction from here up to the Northwest. I had charge of the construction. In the early winter of 1886 which was as I can best remember along about January or December we were blockaded with snow up in there and I was away for a long period of time and that came very near doing me up again. It came very near costing me my life, but at the same time I was up there attending to my business. Now I expected to be able to produce the records of the railroad company to show whether or not I was in Lincoln, but all of their records have been destroyed up to 1894 in regular conformity to their rule to destroy everything that gets so old. So all I have is my recollection and my recollection is based upon the conditions as I remember them of the winter of 1886 and 1887 during those months. I know that winter came very near finishing me, I didn't expect, myself, to get out alive.

"Q. But you remember of having signed other reports? A. I signed them whenever I attended a meeting. I always signed them if they were brought to me. I say when I attended a meeting. The directors at a meeting didn't always sign, because the requirements of the Government didn't require all of the directors to sign, but whenever I was there and it was presented to me, I always signed them.

"Q. But you didn't examine the assets of the bank to ascertain if the report correctly stated them? A. I was always willing to sign any statement of the condition of the bank from the representations that were made to me by the executive committee and the officers of the bank. I couldn't if I had wanted to have done so, made an examination into the condition of that bank and told anything about it, because I know absolutely nothing about book-keeping, and I did there precisely what I have always done with the different kinds of business I have been associated with and at the head of. Now I have been at the head of some very large institutions in this State and what I did there, I have always done.

"Q. In your bank at Aurora you never examined its notes? A. I never examined a note as long as I have been president of that bank, we have an executive committee as they did in this bank.

"Q. You have never looked at the assets yourself? A. I never have, the only thing we look at there, is when we have our annual or semi-annual meetings the notes that are con-

sidered questionable are brought on the table by the committee and discussed and at that time we settle what shall be done with them.

"Q. And if the men who were managing that bank were so disposed they could put in fraudulent paper and you wouldn't know it? A. Yes, sir.

"Q. And they could issue certificates of deposit for one amount and have the books show another one and you wouldn't know it? A. How could any man tell that?

"Q. And they could issue certificates of deposit for one amount and have the books show another amount and you wouldn't know it? A. Yes, and for all any man in the bank might know.

"Q. And so far as you know the bank at Aurora of which you are president may be at this time wholly insolvent? A. It may be if the men there are thieves like Mosher and Outcalt, it may be in the same condition.

"Q. And do you sign statements of that bank? A. I have signed them just as reported to me by these five men.

"Q. Then you sign these reports and take these men's words for it, and send them out to the world as correct? A. Yes, and you do too.

"Q. You sign your name irrespective of the facts you don't know what the true conditions are? A. How could I know better? * * *

"Q. I simply want you to state this that you are signing statements of the condition of that bank and are taking some one else's word entirely for the truth or falsity of the report? A. That is what I am doing, and I couldn't do different if I tried.

"Q. And that is what you did with the Capital National Bank? A. Yes, sir.

"Q. And you didn't know at that time whether the report was true or false? A. I couldn't have known.

"Q. You didn't make any effort to find out except by asking some one else? A. I am going to answer that question right or not at all now.

"Q. I have a right to an answer to that by yes or no. You didn't make any effort to find out except by asking some one else. Can you answer that question yes or no? A. That question cannot be answered by yes or no, because I did not ask some one else, they made their regular written statements

of the condition of that bank, and it was from that that I knew the condition of it. * * *

"Q. You never looked at the canceled certificates of deposit? A. No, I never did, and how could I tell if a certificate showed $641.00 and the records showed $1,641.00?

"Q. Do you suppose that a certificate of deposit actually issued, that the certificate had been issued for $100,000 and the records showed $5.00? A. How could I tell?

"Q. Suppose that certificate has been paid and is in the bank, do you suppose you could compare them and see if they agreed in the amount and name? A. Yes, but I will venture to saay that a man that would do such a thing as that would not be apt to leave it where I could find it."

Mr. Thompson's faith in the bank and in its executive officers, to the time of its suspension, is further emphasized by the following testimony elicited on cross-examination at pages 242 to 243 (printed Record):

"Q. You say you were in Indiana when the Capital National Bank failed? A. I was in Terre Haute. Stúll and I were over there trying to buy the Terre Haute Gas Company, I know I got a telegram there.

"Q. And you say you were astonished that the bank had failed? A. Considerably so, yes, sir.

"Q. Never had any intimation or suspicion of it? A. No, I did not.

"Q. Always thought the bank was solvent? A. I had $28,000.00 in there that I would have gotten out in some way if I had thought it wasn't.

"Q. You thought the bank was solvent? A. Yes, sir.

"Q. You thought it was doing a flourishing business? A. I had no reason for thinking it was doing a losing business.

"Q. Why did you sell your stock? A. On account of personal trouble with Mosher.

"Q. But you never questioned Mosher or Outcalt's honor? A. No, sir.

"Q. Their notes would have been good for quite a considerable amount? A. When the bank closed, the bankers told me, after I got back to Lincoln, that they wanted to let them have money to keep the bank open and Mosher wouldn't do it.

"Q. I suppose their notes for $150,000.00 either of them, would have been considered good? A. I would think so.

"Q. Without security? A. I would think so.

"Q. You sold some of your stock to Mr. Mosher, didn't you? A. Sold it to Mosher in 1891; some of it to Mosher and Outcalt together.

"Q. Did you take any security for it at that time? A. I did, but I offered to let them have it without security and Mosher says, No, I will give you security, and he said, I would rather give you security for it.

"Q. What did they give you as security? A. Gas company stock.

"Q. Notwithstanding they were reported to be millionaires you were willing to take security? A. I would take that from even you.

"Q. You say Mr. Mosher insisted upon giving security? A. I didn't put it that way. I will tell you the transaction if you want to know it.

"Q. Did he volunteer to give you the security? A. He did. I offered to take his and Outcalt's note without any security for my stock for $22,500.00.

"Q. Didn't that excite your suspicion, that he wanted to give security, when a man that is worth a million wanted to give security for that amount? A. I wouldn't think so. I am not a millionaire, but I never borrowed a dollar without giving security, I want them to take it because I want them to take something that is good.

"Q. And that didn't excite your suspicion? A. Not at all."

Further questions on cross-examination touching the incident occasioning the transfer of stock by witness to Mosher and Outcalt elicited the following testimony (printed Record, p. 248):

"Q. You say you had a personal difficulty with Mr. Mosher? A. Yes, sir.

"Q. About when? A. That was the day I sold him my stock, the very day that I sold it to him.

"Q. And your relations were never amicable after that? A. Well, we spoke as we passed each other.

"Q. You spoke as you passed by, and that was about all? A. Yes, sir, that was about all."

The redirect examination which immediately succeeded was:

"Q. Did you have any stock left after that transaction? A. I had $1,000.00.

"Q. Did you have that on the failure of the *failure* (bank)? A. Yes, sir, I did.

"Q. Did you pay the assessment on it? A. Yes, sir, I did.

"Q. How much? A. $1,000.00."

It was thus shown that Mr. Thompson, who was absent on an important business mission when the bank suspended, then had on deposit $28,000; that the failure subjected him to an assessment of $1,000 on his stock, and that he held the note of the president and cashier for $22,500 on account of the stock transaction had more than one year and two months prior to the suspension.

If the degree of faith and confidence reposed in the stability of the bank and the probity of its executive officers be measured by the extent of the personal misfortunes or the amount of funds on deposit, then Mr. Thompson was more confiding than any of the other depositors who claim relief against him. If his good faith as director and his discharge of administrative duties, in so far as they devolved upon him, be tested by the methods employed by him in the conduct of his private affairs, he is then shown to have applied the same methods to the affairs of the bank that proved successful and efficient when employed in his individual enterprises. If he should, before attesting an official bank report, require such information of its verity as would be credited by him in ascertaining the financial condition of a concern under his personal management, his conduct also meets this requirement. His conduct was not that of mere heedlessness. He required and received information as to the condition of the bank before attesting reports, and the information obtained, when judged by the same rules that governed his private business, led him to believe, in good faith, that the attested reports spoke the truth. His informa-

tion came from officers and servants not only fully trusted by him, but standing high in the community, whom he had a right to credit, and whom any business man of ordinary prudence would have credited in a like situation.

These proofs explain the statement in the State Supreme Court's opinion: "We do not wish to be understood to say that *all* of the defendants knew that such statements were false; we are satisfied that such is not the case." Mr. Thompson is necessarily comprehended by this clause, though the court denied him the justice to so state. Do these facts meet the requirements of a cause of action for *deceit?* Has the act of Congress in question adopted this remedy and made it apply to directors who have diligently and faithfully discharged such duties of administration as devolved upon them, who can assert and prove conscious rectitude *to the satisfaction of the court pronouncing judgment,* and who have not in fact been guilty of fraud or deception?

The rectitude of Mr. Thompson's personal and official conduct, so far as it is challenged by plaintiff's petition, is securely established by the references already given. But the high standard of his conduct is strengthened by his recital of the part he had in isolated transactions, about which counsel questioned him for the purpose of testing his good faith and credibility. He was asked on direct examination as to his knowledge of transactions between the bank and E. W. Mosher, of York, Nebraska. In answer he explained that it was a scheme for lending money in behalf of the bank. He showed what part he had in its authorization, the motive in permitting it, and the securities taken in a manner that leaves no room for doubt as to his good faith and his belief in the merit of the securities (printed Record, pp. 225-226).

Asked about the "Small" transaction mentioned by some of plaintiff's witnesses, he promptly gave such details as had come before the board; explained that a correspondent State banker had secured them by a conveyance, which was adjudged to be a mortgage; that the security was adequate and

the bank suffered no more than a nominal loss (printed Record, pp. 226-227).

On cross-examination he was asked as to his knowledge of transactions between Donnell, Lawson & Simpson and the bank which the Capital National succeeded, and he answered, giving the precise details of the proceedings had in relation thereto at the first meeting of the directors of the Capital National Bank; showed that the account was not to be taken over by the new organization, but was to be made good by the stockholders of the old Marsh Bank, and named specific securities delivered by the debtors to the old stockholders, and stated that his information was that the agreement made was carried into effect and the debit balance paid (printed Record, pp. 238-240).

On cross-examination he was asked about a chattel mortgage given to him just prior to the suspension of the bank by Mosher, and answered (printed Record, p. 243) as follows:

"A. Now, I will tell you about that. That was while I was in Terre Haute, Indiana; and while I was there it became evident that the bank was going to fail, and they took this chattel mortgage over and gave it to Mr. Mullen, my secretary, and I never knew anything about it until I came back, when Mr. Mullen gave me those papers; and I said to him, 'You take those papers back to them, and tell them I am not in the chattel-mortgage business.'"

He was asked about the details connected with his sale of bank stock to Mosher and Outcalt, some fourteen months prior to the bank's failure, and the securities received by him on the purchase-money note, and he gave them all without hesitation and with childlike simplicity and directness (printed Record, pp. 244-247); he made bold to assert that subsequent events indicated, what he was then innocent of, that Mosher, in substituting real estate to free negotiable securities, was evidently preparing for trouble. The following answer on page 244 fairly states the result of all this inquiry:

"A. Yes sir, I will have to tell you about that too, whether you want to hear it or not. Now, I held, up until a couple of months or such matter before the failure of this bank, this gas stock as collateral to my note. Mosher came over to my office one day and he says: 'Would you just as soon have real-estate security as collateral, instead of gas stock?' And I said, 'All right.' Mosher then gave me a lot of real-estate security. When I sold that stock to Mosher, I wanted him to understand, and I felt it, that he was welcome to that stock under the circumstances without collateral; but he said, 'I would just as soon give you collateral,' and I took it. When this real estate was given to me, it was given in exchange for that gas stock. *I had no idea that he was preparing for trouble;* but that is just what he was doing, what he wanted to do was to get something in his possession that he could handle."

We have now presented the full course and scope of Mr. Thompson's examination without consciously omitting a material fact or circumstance. If it does not remove every aspersion and insinuation against his good faith and the integrity and candor of his official acts, questioned by the plaintiff's complaint, then direct and simple recitals of truth must have lost their power to persuade. The truth of the facts recited is uncontroverted and incontrovertible. We shall endeavor to show that upon these facts a judgment against him for *deceit,* at the suit of a depositor, cannot be sustained under the terms of the National Banking Act.

Section 5239 (Rev. Stat. U. S.) provides:

"If the directors of any national banking association shall *knowingly violate,* or *knowingly permit* any of the officers, agents or servants of the association to violate *any of the provisions of this title,* all the rights, privileges, and franchises of the association shall be thereby forfeited. *Such violation* shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of *such violation,* every director who participated in or assented to the same,

shall be held liable in his personal and individual capacity for all damage which the association, its shareholders, or *any other person,* shall have sustained in consequence of *such violation.*"

It is to be noted the above section, in stating the contingencies which subject directors to personal liability, follows, almost literally, the language of section 5147, defining the oath which *each* director is required to take. The section prescribing the form of oath (sec. 5147, Rev. Stat. U. S.) provides:

"*Each* director, when appointed or elected, shall take an oath that he will, *so far as such duty devolves on him,* diligently and honestly administer the affairs of such association, and will not *knowingly violate,* or *willingly permit* to be violated, *any of the provisions of this title.*"

The conditions on which liability of forfeiture of charter and personal liability of directors are made to depend are the violations of obligations assumed by each director by his oath of office. By the explicit terms of section 5239, above quoted, such consequences are to follow *only the clear violation, by the individual director,* of his official oath. The only variance found in the latter section from the exact standard of conduct prescribed by the form of oath is the substitution of "*knowingly permit,*" in the latter section, for "*willingly permit,*" the term employed in the oath, and this variance is merely verbal and does not affect the sense or meaning.

Two views have been judicially expressed as to the proper meaning and interpretation of section 5239. One view is that the judgment of forfeiture required at the suit of the Comptroller as a condition precedent to dissolution is also a condition precedent to maintenance of an action to enforce the personal liability of directors (*Welles v. Graves,* 41 Fed., 459; *Gerner v. Thompson,* 74 Fed., 125). The other

view was well expressed by Thayer, C. J., in *Stephens v. Overstolz,* 43 Fed., 771, as follows:

"According to our view of section 5239, *two results,* in no respect dependent upon each other, may follow the making of an excessive loan; that is to say, the Comptroller may, if he thinks proper, proceed to have the charter revoked, alleging the excessive loan as a violation of law. But whether he does so or not, a director of the bank, who *knowingly* participates in or assents to the loan, may be compelled to make good whatever damage results to the bank from making the same."

This view seems to be at the foundation of the ruling in *Briggs v. Spaulding,* 141 U. S., 132-173; and, since it is the view operating most strongly against us, we concede its correctness for the purposes of this argument.

Here the vital consideration is that, whatever view be adopted, the personal liability of the directors is *derived* from the terms of the act of Congress. If the common-law remedies are available against directors in favor of "any other person" who may have sustained damages, it is because of their adoption by Congress in this section of the statute; and, having been so adopted by statute, these remedies are subject to the express limitations and restrictions placed upon them by the literal and precise terms of the act of adoption defining the precedent conditions of their availability. One of these conditions is that the director charged must either have personally *"knowingly violated"* or *"knowingly permitted"* (or by the terms of his oath *willingly* permitted) the *officers or servants* to violate some provision of the National Banking Act. The fact of *knowledge* and *willful purpose,* which is *scienter,* is thus, by apt terms, made a necessary and indispensable element.

To make sure our argument is based upon an indisputable premise, let us further examine the terms of section 5239: It consists of three sentences, all employing apt and specific terms. The *first* sentence contains a definite specification of

the distinct acts violative of *this title* which shall work a forfeiture. The *second* sentence as distinctly employs the identical specifications of the *first,* by reference, as if they were again repeated literally; it is introduced by the adjective *such,* modifying the noun *violation;* and the sole office of the words *such violation,* in this connection, is to definitely specify the identical conditions employed in the preceding sentence, and to import them into the *second,* and make them the subject of the judicial inquiry therein authorized. (See adjective *such* defined in any English dictionary of accredited accuracy.) The *third* and concluding sentence, imposing pecuniary liability, is introduced by the conjunction *and,* followed by a repetition of the words *such violation,* employed above, to introduce the *second* sentence. In the *third* sentence the introductory words *such violation* are, therefore, employed correlatively with the same terms in the *second,* and perform the same office of definitely specifying the *violations* resulting in personal liability to be those previously defined in the *first* sentence. Such references, back to the first-stated conditions, are obvious, evident, and unavoidable.

Proceeding with the argument: The last sentence, therefore, imposes personal liability only in those cases where the director has *knowingly* violated or *knowingly* or *willingly* permitted some other officer or servant to violate some provision of *this title.* The mere fact of *such violation* by some of the directors or officers is not, alone, sufficient to establish liability against all or any particular director; for, by the terms employed to create such personal liability, it is limited and made to apply *only* to the particular director or directors who actively or knowingly or willingly 'participate in or assent to the same.' The element of *scienter* is thus definitely written in the statute. No master of English could have made this meaning plainer or more evident. This conclusion and interpretation is irresistible; it condemns, and ought to destroy, the judgment of the State court.

McDonald v. Williams, 174 U. S., 397-408, a suit arising out of the administration of the assets of this same *Capital National Bank*, is a precedent directly in point which definitely sustains the construction contended for. The case involved the construction and interpretation of section 5204 (Rev. Stat. U. S.), prohibiting withdrawal by a banking association or its members, "either in the form of dividends or otherwise, any portion of its capital." The word *knowingly* is not actually employed in the section. This court by construction read into that section the element of *knowledge*, which is literally employed in section 5239. Mr. Justice PECKHAM in the opinion (p. 406) said:

"One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend."

The meaning above read into the section under consideration by *construction* is expressed in section 5239 *literally*, without aid of construction.

It is further to be observed that the act of Congress in denouncing as crimes falsifications contained in the official reports which the association makes to the Comptroller imposes the penalties, not upon the officers or directors who actually make or attest the reports, but only upon the person making or responsible for making the particular false entry therein (sec. 5209, Rev. Stat. U. S).

In *Cochran v. U. S.*, 157 U. S., 286, 293, Mr. Justice WHITE, construing section 5209 (Rev. Stat. U. S.), said:

"The argument of the defendant assumes that the making of the entry, and the making of the report, are the same thing; whereas, in fact, they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by oath or affirmation of the president or cashier, and attested by the signature of at least three of

the directors. But, under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who *makes any false entry* in any book, report or statement of the association; and that penalty is applicable to any officer or agent of the bank who actually makes the entry," etc.

The purpose and intent of the act is to limit the criminal and civil liabilities depending upon violations of its provisions so that they shall apply only to the actual wrong-doers. In the conduct of corporate business, whether it be financial, commercial, or industrial, all experience teaches that efficient and successful results can generally be attained only by wise selection of trustworthy officials and servants, and then reposing in them a fair degree of faith and trust. Corporate success is not possible under a management that scrutinizes every act and detail of every corporate servant and agent, upon the theory that every such agent or servant is a crook, and that every act will be criminal not done under such immediate supervision as would at once discover its character. The presumption that normal persons, wisely chosen for the trusts committed to them, will ordinarily act from honest and not from criminal motives is essential to business success. And Congress, on providing the national banking system, did not enact that each director should, on pain of being held personally liable for all deposits, conduct the bank's affairs on the theory and presumption that the executive officers, carefully selected, were crooks who in the discharge of all ordinary duties would commit crimes. On the contrary, extraordinary liabilities are imposed only for willful volations and only upon the actual wrong-doer. The whole scheme embodied in the act is made to harmonize with the usual and ordinary standards which experience shows are conducive to best results in financial, commercial, and industrial enterprises.

Congress did not enact that the *innocent* director be sacrificed as a vicarious atonement for the crimes, secretly committed, of a faithless executive officer who had been chosen in good faith. Neither did it enact that the association should, like the Garden of Hesperides, have a dragon sentinel put on watch over its affairs, whose ferocious vengeance would visit undiscriminating disaster alike upon the innocent and the guilty. Such consequences will, however, necessarily flow from the rule adopted by the Nebraska Supreme Court, eliminating *scienter* and striking from section 5239, wherever employed, the word *knowingly*.

It cannot be urged, in defense of the judgment of the State court, that it tends to stimulate or promote honesty in business transactions. On the face of the record, the judgment makes no pretense of imposing liability against Mr. Thompson because of his dishonesty; on the contrary, as heretofore shown, his honesty and good intentions are judicially established; he is held not even to have known of the falsehoods on which the suit is based. The judgment of the State court makes no pretense of imposing liability upon Mr. Thompson because of his maladministration or neglect of official duty; on the contrary, losses from such causes accrue to the association and pass to the receiver for equal and ratable distribution to *all* depositors. The present plaintiff seeks the entire avails of this suit. To justify its ruling the State court was driven to a distinct disavowal that either negligence or maladministration was a ground of liability in the present suit, and so distinctly classified the suit as an action of deceit. On any other construction the State court concedes that plaintiff could not sue for its own benefit, to the exclusion of other depositors.

At the common law and by the act of Congress *scienter* is an element of the cause of action of *deceit*. This cause can properly be maintained only upon sufficient proof of actual fraud and dishonesty. But the State court conceded Mr. Thompson's honesty, and, like a dragon, visited its

wrath upon him along with the guilty and dishonest officials. What a lowering of judicial standards! When the judicial rewards of honesty are but the punishments prescribed for the guilty, what stimulus can the courts claim to offer for the promotion of official integrity? Its employment to enable one sufferer from a common misfortune to turn upon a fellow-loser and seize what he still has left puts the action of *deceit* to a new and startling use and purpose, never dreamed of by the ministers of the common law, who gave relief only against the *wrong-doer*. Contemplation of such judicial rewards of honesty recalls the words of Antigonus to Leontes:

> "If it be so,
> We need no grave to bury honesty;
> There's not a grain of it the face to sweeten
> Of the whole dungy earth."

Long before the passage of the National Banking Act, and at least as early as 1851, this court had definitely ruled that, at common law, *scienter*—guilty knowledge and willful participation in the fraud—is an essential and indispensable element of the cause of action for deceit (*Lord v. Goddard*, 13 How., 211), which applied the rule requiring proof of *scienter* as rigidly, perhaps, as any of the reported cases. There a written letter recommending a firm as entitled to credit was the basis of the action. The fact that the firm so recommended was not entitled to credit is thus asserted in the opinion:

"On the faith of this letter, Goddard credited West & Daby for a cargo of lumber worth nearly two thousand dollars, giving them four months' time; for which lumber West & Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence."

Under these aggravating circumstances, Mr. Justice CATRON, expressing the unanimous opinion of this court, said.

"The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an *intention* to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycroft v. Creasy,* 2 East, made in 1801, the question has been settled to this effect in England.

"The Supreme Court of New York held likewise in *Young v. Covell,* 8 Johns., 23. That court declared it to be well settled that this action could not be sustained, without proving actual fraud in the defendant, or an *intention* to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient. This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts."

The rule of the above-cited case, holding that it has for more than a century been the settled doctrine of the common law that *scienter* is a necessary element of the cause of action for deceit, has not been departed from by this court. On the contrary, that doctrine has since been adhered to and repeatedly reaffirmed, as the following cases show:

In *Ming v. Woolfolk,* 116 U. S., 599, 602, Mr. Justice WOODS, in an opinion expressing the unanimous judgment of this court, thus defined the elements of the action of *deceit:*

" 'The requisites to sustain an action for deceit,' says Baron Parke in *Watson v. Poulson,* 15 Jurist, 1111, are 'the telling of an untruth, *knowing* it to be an untruth, with *intent* to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage.' See also *Palsey v. Freeman,* 3 T. R., 51; *Polhill v. Walter,* 3 B. & Ad., 114; *Levy v. Langridge,* 4 M. & W., 337; *Brown v. Castles,* 11 Cush., 348; *Tryon v. Whitmarsh,* 1 Met. (Mass.), 1."

In *Gordon v. Butler,* 105 U. S., 553, 556, the action for deceit and fraud was founded on a written estimation or appraisal of the value of property offered as security for a loan of money. Mr. Justice FIELD, delivering the unanimous opinion of this court, said:

"The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a *false* and fraudulent certificate of valuation of the property given as security for the loan. * * * To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had *knowledge, at the time,* that the value of the property was materially less than their estimate."

The State courts at and prior to passage of the National Banking Act were in unanimity in their holdings that, at common law, *scienter* was a necessary element of the cause of action for deceit, and the State courts are still in practical unanimity in holding to the same rule. The courts of New York, whose judgment was cited as authority by this court in *Lord v. Goddard* (*Young v. Covell,* 8 Johns., 23), have since maintained a consistent adherence to the rule. In a recent case, *Kountze v. Kennedy,* 147 N. Y., 124, the Court of Appeals, in an opinion by ANDREWS, C. J., said:

"The principle stated by Croke, J. (3 Bulst., 95), in respect to actions for damages for deceit, that 'fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies,' has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase 'legal fraud,' which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or, not knowing whether it was true or false and not caring what the fact might be,

made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who *intentionally* deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, *reliance upon information which a wiser man might not credit, misconception of the facts* or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit."

Among other New York cases to the same effect are: *Powell v. Linde,* 171 N. Y., 675; *Daly v. Wise,* 132 N. Y., 306; *Lamb v. Kelsey,* 54 N. Y., 645; *Wakeman v. Dailey,* 51 N. Y., 27; *Hubbell v. Meigs,* 50 N. Y., 480; *Oberlander v. Spiess,* 45 N. Y., 175; *Marsh v. Falker,* 40 N. Y., 562.

Professor LEE, in a most excellent article on *Fraud* (20 Cyc., 24), says: "It is well settled that to support an action of deceit, based on false representations, a *scienter* must be proved." And in the foot-note he supports the text by references to numerous adjudications in twenty-six States, in the Federal courts, and in the English and Canadian courts. The Supreme Court of Nebraska is well-nigh alone in perverting the common-law doctrine by striking out the element of *scienter,* which is the very pith and substance of the charge of deceit.

We forbear to burden the brief with further references to adjudicated cases. The existence of the common-law rule contended for had been declared by this court and recognized by the courts of the several States prior to passage of the National Banking Act. The fact of its existence and general recognization at the date of passage of that act is well established. It remains only to make the application of this fact to the present case.

If Congress intended by the act in question, and particularly by section 5239, to adopt the common-law remedy of deceit as an appropriate remedy in behalf of a depositor against a director for recovery of damages sustained through official acts in attesting reports to the Comptroller which were false and untrue, it would naturally adopt the common-law rule of liability. By that rule the remedy could apply only when the attestation was made in bad faith, with knowledge on the part of the director of the falsity thereof. Congress, therefore, adopted the rule of the common law as then interpreted by it in the act itself. Insomuch as the liabilities of directors and the rights of persons injured might be enforcible in the State forums, it was desirable that the rule of liability be uniform; that the question of liability should not be the subject of the mere whim or the established rule of a merely local forum. Uniformity of the rule of liability was aimed at; and so the act defined the conditions upon which personal liability of the director should attach. Congress placed its own meaning and interpretation upon the common-law rule adopted by it, which was then the accepted interpretation of the courts. To hold any other interpretation would tend to lessen the efficiency of the national banking system as a public utility and to make the liabilities of these important public functionaries a matter of doubt and uncertainty, subject to arbitrary rules of the local forum. The feasibility of taking the responsibility of a national bank director would, under any other rule, depend upon the particular location of the bank.

II.

The specific regulations adopted by Congress to safeguard the interests of depositors and to insure faithful administration by directors are exclusive. They preclude all local State regulations and interference. Their uniform enforcement throughout the land is essential to the preservation and maintenance, as a public utility, of this national institution.

It is entirely clear that the rule of liability defined by the act of Congress is exclusive. It binds and controls the State courts, and cannot lawfully be circumvented either by a State law or by application of a supposed contrary rule of the common law. By the Constitution of the United States (art. VI, sec. 2) it is declared:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Thus, by the fundamental and paramount law, the act of Congress is expressly made a part of the law of "every State," and "the judges in every State shall be bound thereby." That the National Banking Act in itself embodies a complete system, and that its provisions are exclusive, touching the particular subjects treated, are propositions too well settled by adjudications in this court to admit of any reasonable dispute. Mere references to the cases are the conclusive and only arguments to these points now admissible.

In *Cook County National Bank v. United States*, 107 U. S., 445, 448, Mr. Justice FIELD, defining the scope and purpose of the National Banking Act, in an opinion expressing the unanimous views of the court, said:

"We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositories of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, *as in a separate code by itself,* neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

Easton v. Iowa, 188 U. S., 220-239, involved the power of the State, by statute, to provide for punishment of national bank officials receiving deposits with knowledge of the bank's insolvency. In an opinion holding the State law invalid and the provisions of the National Banking Act to be paramount and exclusive Mr. Justice SHIRAS, after reviewing the adjudications, expressed the unanimous views of the court as follows (pp. 238-239):

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports

to be made of their condition, and by the power of visitation by Federal officers; that it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the General Government. * * * Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States. It was by failing to observe the distinction between the two classes of cases that, we think, the courts below fell into error."

Davis v. Elmira Savings Bank, 161 U. S., 275-290, involved the validity of a statute of New York giving savings-bank deposits a preference in the distribution of assets of insolvent banks. In holding the State law invalid, in so far as it was sought to be applied to a subject covered by the act of Congress, Mr. Justice WHITE, in an opinion expressing the unanimous judgment of the court, said (p. 283):

"National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that any attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In *Easton v. Iowa, supra,* 188 U. S., 229, the Iowa Supreme Court in its opinion noted that the acts of Congress provided no penalty for the fraudulent receiving of deposits; asserted that the State law did not, therefore, encroach upon the

subject-matter of the national legislation, and that it was not material that, in violating the State law, the offender was doing an act pertaining to his duty as an officer of a national bank. Answering these suggestions, Mr. Justice SHIRAS in the opinion said:

"We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system *extending throughout the country*, and *independent*, so far as powers conferred are concerned, of *State legislation*, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States."

Another line of cases which well illustrates the rule that the National Banking Act is complete in itself, like a separate and distinct code, whose provisions touching the subjects actually legislated upon are exclusive, relates to the penalties for collecting usurious rates of interest. Most of the States have usury laws, and the State courts have frequently applied the penalties prescribed by State laws to national banking associations. Whenever such judgments have been here for review, this court has held the remedy provided by the act of Congress to be exclusive, and has reversed the judgments of the State courts applying the rule of the local forum (*Bank v. Dearing*, 91 U. S., 29; *Barnett v. National Bank*, 98 U. S., 555; *Stephens v. Monongahela Nat. Bank*, 111 U. S., 197; *Haseltine v. Central Bank*, 183 U. S., 132; *Schuyler Nat. Bank v. Gadsden*, 191 U. S., 451, repelling a very recent invasion and usurpation of power by the Nebraska Supreme Court).

Farmers' and Merchants' National Bank v. Dearing, 91 U. S., 29-37, is the original case construing the provisions of the National Banking Act, in respect to penalties for taking usurious interest, to be exclusive. In expressing the view that Congress intended by the act to establish a uniform rule applicable to all national banks, without regard to local

usury laws, Mr. Justice SWAYNE in the opinion (p. 33) said:

"The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be, that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess; while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice."

The argument embodied in the above quotation is peculiarly applicable to the present case. The official acts of Mr. Thompson complained of here, if done in New York, would not subject him to liability in an action of deceit, because the rule in that State requires proof of *scienter*. But in Nebraska, if the local law governs, on the same facts, and notwithstanding a specific finding of his good faith, Mr. Thompson is, in effect, made liable for all the deposits, amounting to more than one million dollars. Applying the argument of Justice SWAYNE: "Why such discrimination? This would be contrary to the plainest principles of justice."

In the same case (*Bank v. Dearing*, 91 U. S., 33) it was further said in the opinion by Mr. Justice SWAYNE:

"The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'

Against the national will, 'the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.' *Bank of the United States v. McCulloch, supra* (4 Wheat., 316); *Weston and Others v. Charleston*, 2 Pet., 466; *Brown v. Maryland*, 12 Wheat., 419; *Dobbins v. Erie County, id.*, 419. The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The Government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. * * *

"It must always be borne in mind that the Constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section, the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreasonable, and contrary to the manifest intent of Congress."

The point here urged against the validity of the judgment under review is not new. Neither counsel nor this court, as constituted since passage of the National Banking Act, has had the initiative in its presentation or application. It involves the conception of a nationality that is supreme within its sphere of action, the exercise of whose powers, within the limitations imposed by the instrument which granted them,

operates as a restraint upon the States. It involves the relations of the National Government with the States, the limitations of the powers of each, and the separate boundaries within which each may consistently exercise supreme and sovereign power. It involves a question formerly so sensitive and vital to the national life that its adjudication by Chief Justice MARSHALL, the world's greatest jurist, aided by luminous arguments by such master advocates as Webster, Pinckney, and Clay, could not stay a challenge to arms by the States still holding to the doctrine of State supremacy. Without any disparagement of the eminent jurists who, in the cases already cited, have applied the rule of national supremacy in interpreting the act of Congress which creates our present national banking system, it may be said that the first promulgation of that rule, and its judicial credence and application, should be accredited to Chief Justice MARSHALL. It arose in a series of cases involving the power of the States to tax the branches of the Bank of the United States established within the States. Unfettered power of taxation by the States involved the power to make the burden so onerous as to drive the national institution out of the States,—and some of the States manifested a spirit tending to that end and to supplanting it by State banks. The conception of a nationality with supreme authority when acting within its delegated powers, and whose exercise of authority within such powers was so far a restraint upon State sovereignty, led Chief Justice MARSHALL to the conclusion that the regulations prescribed by Congress for government of the Bank of the United States were exclusive and precluded local interference by the States, even in the matter of taxation, in the absence of any explicit prohibition in the act itself (*McCulloch v. State of Maryland*, 4 Wheat., 316-437; *Osborn v. Bank of United States*, 9 Wheat., 738-903; *Bank of United States v. Planters' Bank*, 9 Wheat., 904).

The doctrines since held by this court to control the interpretation of the present national banking law and to de-

termine the national character of the associations created by the act of Congress now in force were all declared and expounded in the opinions in the first two of the cases above cited, with a power of analysis, not only unsurpassed, but unequaled.

In *McCulloch v. Maryland*, 4 Wheat., 424, after a long and minute analysis of the public utilities and functions to be performed by the agency of the Bank of the United States, Mr. Chief Justice MARSHALL in the opinion said:

"It can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution."

That the power of taxing the bank by the States may be exercised so as to destroy it was said in the opinion to be "too obvious to be denied." The principle operating, in such situation, to place the bank beyond the reach of the taxing power of the States was thus stated in the opinion (*Ib.*, 426):

"This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these

powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

In determining the issue with reference to the relations of the two sovereignities, that of the Union and of the States, the Chief Justice said (pp. 429, 430):

"If we measure the power of taxation residing in a State, by the extent of sovereignity which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise."

We quote further from the same opinion (*Ib.*, 431):

"Would the people of any one State trust those of another with a power to control the most insignificant operations of

their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

And again (p. 433):

"If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

Answering the suggestion, the rule adopted should be reciprocal and deprive the Federal Government of power of taxing State banks, the Chief Justice said (pp. 435, 436):

"But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of

a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Osborn v. Bank of the United States, 9 Wheat., 738-903, held invalid a statute of Ohio imposing upon the Bank of the United States, or any other bank doing business within the State without authorization by its laws, an annual tax of $50,000 on each office of discount and deposit. The questions decided in *McCulloch v. Maryland* were again maturely considered, and the holding of the former case was reaffirmed. Speaking of the situation which would be presented if the Federal courts in such cases had no power to restrain enforcement of the void act, Chief Justice MARSHALL in the opinion (pp. 847, 848) said:

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the Government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of

arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the Government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

"The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law."

Defending the right of the bank as a fiscal agency of the Government to claim exemption from the operation of local State laws, the Chief Justice further said (pp. 863, 864):

"Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense,

the profits of the banking business, instead of other emoluments, to be drawn from the Treasury, which banking business was essential to the operations of the Government, would each State in the Union possess a right to control these operations? The question on which this right would depend must always be are these faculties so essential to the fiscal operations of the Government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

"Congress was of opinion that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the Government, is too obvious for controversy; and who will venture to affirm, that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the Government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government, than it could otherwise be; and, if this be true, the capacity to carry on this trade, is a faculty indispensable to the character and objects of the institution."

Answering the suggestion that to exclude State authority it was necessary that the act of Congress contain an *express* exemption of the bank from State interference, the Chief Justice said (pp. 865, 866):

"It is not unusual, for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors

of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples, in point. It has never been doubted, that all who are employed in them, are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the Government in administering this security."

Mr. WEBSTER's famous exposition of the Constitution, delivered in the Senate in 1832 and so generally considered to be the most complete and correct exposition of the true powers and functions of the National Government, may, almost, be said to be but an adaptation of the analytical expositions of Chief Justice MARSHALL, contained in the opinions above cited. While we question whether the exposition of the greatest advocate surpasses that of the greatest judge, they, happily, arrived at the same conclusions. The following paragraph is from Mr. WEBSTER's great speech:

"And finally, the people of the United States have at no time, in no way, directly or indirectly, authorized any State legislature to construe or interpret their instrument of government, much less to interfere by their own power to arrest its course and operation. If, sir, the people in these respects had done otherwise than they have done, their Constitution could neither have been preserved nor would it have been worth preserving. And if its plain provision shall now be disregarded, and these new doctrines interpolated in it, it will become as feeble and helpless a being as enemies, whether early or more recent, could possibly desire. It will exist in every State, but as a poor dependent on State permission. It must borrow leave to be, and will be, no longer than State pleasure or State discretion sees fit to grant the indulgence, and to prolong its poor existence."

In *Van Brocklin v. Tennessee,* 117 U. S., 151, 155, Mr. Justice GRAY (adopting the language of Marshall, C. J. in *McCulloch v. Maryland*) said:

"There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation *or otherwise,* to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

All of the principles declared to be at the foundation of the decisions against the power of the States to tax the Bank of the United States apply with added force to the case made by the record now under consideration. The act incorporating the Bank of the United States seems to have been silent upon the question of whether the bank was subject to, or exempt from State taxation. But the present National Banking Act has adopted *specific regulations* for safeguarding the interests of depositors and for stimulating directors to a faithful discharge of their administrative duties, including the imposition of a definite and contingent personal liability for violations of duty, *knowingly* done. These regulations are exclusive and binding upon the courts and legislatures of all the States. The director called to account civilly for improper discharge of official duty is entitled to have the question of his liability determined upon a consideration of the act of Congress defining his duties and fixing and determining the conditions upon which such liability arises. In assuming to adjudge Mr. Thompson's liability upon considerations wholly without the terms of the act of Congress and upon facts which, by the definite terms of the act, distinctly excluded all liability the State court has made the purely local rule of its own forum superior to the rule adopted by Congress; it has made the authority of the State paramount to that of the National Government, over a national utility and administrative agency, in the creation and regulation of which the national authority is, by the Constitution, supreme; and it has thus, most completely,

nullified the act of Congress in so far as it applies to determine Mr. Thompson's liability as a national bank director. Encroachment by the State authorities upon the supreme powers of national administration and impairment by the State courts of rights and privileges granted by Congress to an agent of the national administration are not to be tolerated. The interpretation of the National Constitution, consistently maintained by this court for a century or more, leads necessarily to the conclusions that the regulations contained in the National Banking Act are paramount and exclusive, and that the courts of all the States are bound to recognize and administer them in determining the liabilities for official acts of the administrative public functionaries created by that act of Congress.

The doctrine that the laws of Congress, passed pursuant to the Constitution, to facilitate the national administration are supreme and exclusive and must be recognized, observed, and obeyed by all the States had, however, been suggested long before its ultimate determination by Chief Justice MARSHALL in the great cases of the Bank of the United States. That doctrine was at the foundation of the decision of this court in *Chisholm v. Georgia,* 2 Dallas, 419-480, decided in 1793. In that case Mr. Justice WILSON (2 Dall., 464) said:

"When certain laws of the States are declared to be subject to the revision and control of the Congress (Const., art. I, sec. 10), it cannot, surely, be contended that the legislative power of the National Government was meant to have no operation on the several States."

Before the creation of this court, of which he became a justice upon its organization, Mr. WILSON asserted that the Congress, under the Articles of Confederation, had power to institute, organize, and charter the Bank of North America. Insomuch as the greatness of that eminent statesman and jurist has, in later years, been so generally, though tardily, recognized, it is appropriate to note that in his argument

favoring the establishment of the Bank of North America, made in 1785, he is accredited with saying:

"Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled."

It is singular how the great principles controlling the powers and functions of the General Government have, from the days of the Confederation to the present, found expression in forensic debate before and judicial decisions since the adoption of the Constitution interpreting the powers and privileges of national banks created by the various acts of Congress. Adapting the principle asserted by Mr. Justice WILSON, Congress and this court have always found the establishment and regulation of these national administrative functionaries an *object* "to the direction of which no State is competent," and that the management of them "of necessity belongs to the United States." So, necessarily, the regulations prescribed by Congress defining their powers and liabilities and the liabilities of their officers for official acts are the supreme and exclusive rules, binding alike upon the Federal and State courts. If the condition precedent to any personal liability of the director for official acts (that his conduct was knowingly or willfully violative of the banking act) may be disregarded and erased by the State courts, then section 5239 may as well be entirely erased and obliterated.

The cases already adjudged by this court involving the scheme of national banking cover a wide scope of interpretation and analysis and leave no unexplored field of inquiry. Attempted usurpations and invasions by the States upon three separate subjects of this national legislation are shown in the judgments cited. The Iowa court (and the courts of other States) ruled that national bank officers in doing official acts were subject to the criminal laws of the State. The New York court ruled that a State law giving priority

to savings bank deposits in distribution of the assets of insolvent banks was enforcible against national bank receivers. Other State courts ruled that national banks were subject to local usury laws. These instances indicate a tendency toward aggrandizement and usurpation by the local forums and an obstinate disregard of the national character and purpose of the national banking system. These attempted usurpations of local power to supplement and aid the national banking scheme devised by Congress—(1) by affording greater protection to depositors through criminal punishments for fraudulently receiving deposits, (2) by protecting borrowers from excessive interest charges through imposition of more stringent penalties for usury, and (3) by protecting the sacredness of savings bank investments through preferences in cases of insolvency—were repelled by the judgments of this court in the cases cited. This court, in *McDonald v. Williams*, 174 U. S., 397, determined the liability of a stockholder, charged with receiving dividends out of the capital, solely upon the terms of the banking act, to the exclusion of the common-law rule in such cases.

The instances mentioned are not more glaring than that exhibited by the present record. The considerations requiring this court in those cases to uphold the national character of the banking scheme providing a national bank currency apply with emphasis to the present case. In principle the cases cannot be distinguished. To sustain this view we here suggest a further application of the rule of those cases to the present record.

The plaintiff here is a depositor of the Capital National Bank, and has the same rights as other depositors to claim the protection of the official reports and the same remedies for redress. Congress legislated in plaintiff's interest. Congress adopted such measures as it deemed wise and expedient to safeguard the interests of the depositors; it provided a specific individual liability against all shareholders equal to the par value of the stock for the sole use of the bank's

creditors in case of insolvency, and furnished an agency for summary imposition and collection thereof; it provided for actions, in favor of all persons damaged thereby, against such of the directors as *knowingly violate* or *knowingly permit* violations of the act, and it provided criminal punishments against the particular officers guilty of embezzlements and other faithless acts in breach of trust, including the making of false entries in books or reports. In these respects Congress, on creating this national institution as a public utility, determined, in its own wisdom, what provisions were prudent and necessary for the best and truest interests of the depositors without delegating to the State legislatures or the State courts the power to supplement or aid its own legislation.

Every consideration suggested in support of the ruling in *Easton v. Iowa* (188 U. S., 220) applies with emphasis to the case here presented. In the Iowa case no specific punishment for the particular offense could be pointed out. Here, when the State court is referred to the *particular statute* creating and limiting the director's liability, it freely concedes that the case made does not show that he *knowingly* violated the National Banking Act, the sole statutory condition on which his liability attaches, but asserts there is *no reason* why a supposed rule of the local forum, dispensing with this statutory element of *scienter*, should not apply to the official acts of bank directors. There is here involved the same error, so many times condemned by this court. The State court ruled that the national character of the banking system does not entitle the association and its officers to claim uniformity in the rules regulating their conduct and liabilities throughout the whole country nor exempt them from the arbitrary rules of the purely local forum. The rule of the cases cited, definitely exploding that doctrine, when applied to this record, will necessitate a reversal of the judgment of the State court.

If the State court can ignore the conditions precedent to

the director's liability prescribed by section 5239 by enforcement of a more rigorous local rule of the common law, then it is competent for the State legislature to adopt a standard of liability *by statute* variant from that prescribed by Congress. Nebraska was carved out of the territory embraced in the Louisiana Purchase, and was only recently settled and admitted as a State. There the rules of the English common law are in force only because of their adoption by local statute.* There, as in other States, the legislature has unfettered power to change or abolish any rule of the common law. If the rule abolishing *scienter* as an element of this cause of action were the creation of a State statute which the State legislature, under its power of classification, had enacted should apply in cases of deceit brought by depositors against national bank directors, based upon official statements made pursuant to section 5211, Revised Statutes of the United States, would this court sanction the usurpation? If such doctrine be tolerated, to what end will it lead? It may be presumed that each State, zealous of its local powers, will undertake to exercise them in passage of laws designed to safeguard depositors in national banks by holding directors to rigorous rules of liability. Thus the responsibilities of safeguarding the patrons of these national institutions would be assumed by the several States, and the rules of personal accountability, applicable to directors, would be as varied and changing as the States are numerous. The prime consideration to a man of affairs and pecuniary responsibility contemplating entry into the directory of a national bank is, What personal liabilities will this office subject me to in case my official conduct is upright and honest?

* NOTE.—The statute adopting the common law is: "So much of the common law of *England* as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, *or with any law passed or to be passed* by the legislature of this territory, is adopted and declared to be the law within said territory" (Comp. St. Neb., ch. 5a).

Shall he seek an answer to this inquiry in the act of Congress? Or shall he be told that his liabilities will depend upon the ever-changing temper of the State legislatures and the State courts? Delegation of power to the States in such case would carry with it power to make the office of a national bank director so onerous and precarious that the national institution would be driven from the local field and supplanted by the local State bank. Such construction would be destructive of the very purpose and end of the National Banking Act. The public utility and perpetuation of the national bank, which has been so beneficent and powerful in the attainment of our financial, commercial, and industrial supremacy, depends upon its maintenance as an independent national institution. If its existence is to continue, it must be kept above the reach of the assaults of the local State governments, and the rules prescribed by Congress for its government and defining the duties and liabilities of its officers must be held of uniform application throughout the nation, and to exclude local regulation or interference.

It is pertinent, in closing the argument, to again recall the grounds upon which the State Supreme Court based its judgment of affirmance, and to show that the points urged against the judgment of the State court apply technically and precisely to the present records. There is no need to review the opinion of the State court at length. The court there prepares its own syllabus of the points decided. That the court conceded the action could not be maintained for *negligence* is shown by the first point stated in the syllabus (printed Record, p. 86), as follows:

"1. Damages resulting to a national bank, from misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors thereof."

That the sole ground of liability is distinctly rested upon the *official* acts of the directors done in compliance with section 5211 of the Revised Statutes of the United States is shown by the second point stated in the syllabus (printed Record, p. 86), which in Nebraska practice is prepared by the court itself, as follows:

"2. The officers of a national bank are personally liable for false reports made and published by them, *in pursuance of* sec. 5211, Rev. Stat. U. S., to the party injured thereby; and the right of the injured party to maintain the action does not rest on the Federal statute, but the common law."

It will be idle to examine the record to discover any other fact, at the foundation of this judgment, against Mr. Thompson than his alleged official acts, done *pursuant to* section 5211, of attesting four of the bank's official reports to the Comptroller. There is no pretense of proof of any other fact against him. In this behalf the opinion of the Nebraska court correctly reflects the record.

The errors of the lower courts, both State and Federal, are manifest and aggravating. It is clear that plaintiff's right of action is founded on section 5239 of the Revised Statutes of the United States; that the cause was, therefore, removable, and that the United States Circuit Court for the District of Nebraska was in error in remanding it after removal. If plaintiff in error had been accorded his clear statutory right of trial in the Federal court, judgment, on this same record, must necessarily have gone in his favor, (1) because the Circuit Court of Appeals of the Eighth Circuit had ruled that similar petitions did not state a cause of action maintainable by plaintiffs, and (2) because, in this forum, *scienter* is an indispensable element of the cause of action for deceit, and the application of this rule to the evidence, as viewed by the State court, would have necessitated a directed verdict in favor of Mr. Thompson. The errors of the State court are already sufficiently discussed.

By the proceedings shown, after the Federal courts had

alternately held and remanded the cause, the defendants were forced to trial in Seward, a country county-seat outside the district of their domicile. Mr. Thompson a man of great capabilities and of the highest character for uprightness and probity, not only of local prominence, but whose distinguished services for his country have advanced him in the diplomatic service to the rank of embassador, has been held liable, under a slanderous charge of fraud, for the amount of the deposits of plaintiffs in a national bank in which he was a mere director. He is subjected to this pecuniary loss and to this odious degradation and punishment, notwithstanding he has established his own official rectitude and his innocence of actual wrong to the satisfaction of the court which condemned him. The proceedings, so eventuating, are in total disregard of the plain provisions of the act of Congress and of the repeated mandates of this court declaring and upholding the national character of our banking system, and enforcing throughout the whole land the uniform regulations and liabilities created by the act for government of the associations and their officers.

Conclusion.

The controlling principles definitely established by the former judgments of this court heretofore cited and applied to the record under review are:

1. National banking associations are utilities of the national administration, created by act of Congress to provide a national bank currency secured by Government bonds, under conditions creating a strong demand for national securities, to aid in the fiscal operations of the General Government and to perform many minor administrative functions.

2. No State is competent to establish and maintain such a system and make it operative throughout all the States nor to endow it with the powers of a national administrative

agency. Sole power to create such institution is vested in Congress. The power to maintain, regulate, and preserve is an incident of the power to create, and also resides solely in the Congress.

3. The regulations prescribed by the act of Congress for government of such national institutions, defining the duties and liabilities of directors and safeguarding the interests of depositors, are of uniform operation, apply to all associations organized under the act, and necessarily exclude application of the local laws of the States, whether local statutes or local interpretations of the civil or common law.

4. Section 5239 (Rev. Stat. U. S.) requires that *knowing* and willing participation in the wrongs causing "damages to the association, its shareholders or depositors," must be shown, and this fact is made a condition precedent to the directors' liability for official acts and an essential and indispensable element of the cause of action.

5. If section 5239 gives legislative sanction for employment of common-law action for *damages* against directors, its own terms definitely restrict their application to cases in which the director participated in the wrong *with guilty knowledge* and makes proof of a *scienter* indispensable.

6. Application of the rules of the local State forums, by which the director is subjected to more rigorous standards of pecuniary responsibility than those prescribed by Congress, implies the power of the States to make the burdens of directors so onerous and their situation so precarious as to be prohibitive of the maintenance of the national associations within the States. Such a rule would make the success of the national scheme of banking dependent upon the good will and indulgence of the States, and, in the end, would invite prohibitive State legislation, as was shown in *Osborn v. Bank of the United States.*

7. The judgment of the Supreme Court of Nebraska, under review, definitely repudiates the authority of section 5239 of the Revised Statutes of the United States, and holds the authority of Congress in contempt upon a subject over which the Constitution makes the power of Congress supreme and exclusive.

The judgment below is, therefore, violative of the act of Congress and of article VI, section 2, of the Constitution of the United States, making the Constitution and the laws of the United States made in pursuance thereof the "supreme law of the land" and binding upon "the judges in every State." For the reasons above assigned, the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted.

HALLECK F. ROSE,
Of Counsel for David E. Thompson,
Plaintiff in Error.

LINCOLN, NEB., *December* 18, 1906.